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In The
Supreme Court of the United States
October Term, 1983

NORTH PLATTE BAPTIST CHURCH
of North Platte, Nebraska,
A Corporation; North Platte Christian School,
North Platte, Nebraska; and Robert D. Gelsthorpe,
Petitioners,

vs.

STATE OF NEBRASKA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
SUPREME COURT OF THE STATE OF NEBRASKA

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QUESTION PRESENTED

When United States and Nebraska Constitutional issues are raised in defense to an action to enjoin the operation of a church school, may the court summarily enjoin the operation of the church school ministry, the operation and calling of its pastor, and the religious expression and parental rights of its members despite the fact that there remained to be determined material factual issues?

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No. .....

In The

Supreme Court of the United States

October Term, 1983

NORTH PLATTE BAPTIST CHURCH
of North Platte, Nebraska,
A Corporation; North Platte Christian School,
North Platte, Nebraska; and Robert D. Gelsthorpe,
Petitioners,

vs.

STATE OF NEBRASKA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF NEBRASKA

The petitioners, North Platte Baptist Church of North Platte, Nebraska, North Platte Christian School, and Robert D. Gelsthorpe, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska made in this proceeding on March 2, 1984.

OPINIONS BELOW

The opinion of the Supreme Court of the *State of Nebraska, ex rel. Charles A. Kandt v. North Platte Baptist Church, North Platte Christian School and Robert D.*

Gelsthorpe, is as yet unreported, but is printed in Appendix B, hereto, at App. 3, *infra.* The Summary Judgment and Order of the District Court In And For Lincoln County, Nebraska, is unreported, but is printed in Appendix A, *infra,* at App. 1.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was made on March 2, 1984, and this petition for certiorari is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) in that the validity of a state statute is drawn into question as being, in its application, repugnant to the First, Ninth and Fourteenth Amendments to the United States Constitution and to Article I, Sec. 4 of the Nebraska Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the Nebraska Constitution, the United States Constitution, and the Nebraska Reissue Revised Statutes are involved in the questions presented.

United States Constitution

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. XIV § 1:

. . . no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nebraska Constitution

Neb. Const. Art. I § 1

All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

Neb. Const. Art. I § 3

No person shall be deprived of life, liberty, or property, without due process of law.

Neb. Const. Art. I, § 4

All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious beliefs; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination

in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Revised Statutes of Nebraska

This petition also involves sections 79-201, 79-328, and 79-1701, Reissue Revised Statutes of Nebraska, 1943, as amended by An Act Relating To Schools, LB 928 (April 5, 1984), set forth verbatim in Appendix H hereto, *infra,* at App. 61-71.

———o———

STATEMENT OF THE CASE

Petitioners North Platte Baptist Church, North Platte Christian School and Robert D. Gelsthorpe were defendants in an action in the Lincoln County, Nebraska, District Court for injunctive relief brought by the State of Nebraska upon the grounds that they were in violation of certain of the school laws of the State of Nebraska. Petitioners raised as affirmative defenses to those allegations claims that, as applied to them, the Nebraska school laws and regulations are violative of their rights to religious liberty, freedom of speech, freedom of association, to due process of law, and the right of Petitioner Gelsthorpe as a parent to direct the education of his child and as an individual to perform his calling as pastor of the petitioner church and church school as guaranteed by the First, Ninth, and Fourteenth Amendments to the United States Constitution and by Article I, section 4 of the Nebraska Constitution. None of the petitioners had ever been a party to a suit in which the claims made by them were litigated.

Respondent moved for summary judgment upon affidavits. Petitioners responded with affidavits, once again raising issues of fact, unrebutted by respondents, which tended to demonstrate violation of petitioners' constitutional rights and that the state's interest in the school laws of the state could be adequately met by an alternative means less drastic to the constitutional rights of petitioners than the violative school laws.

On March 7, 1983, the District Court granted respondents' Motion for Summary Judgment, finding

> that there is no genuine issue of fact. The Court further finds that the defendants' contention that all the issues involved herein were not disposed of by *Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571 (1981) is without merit. All issues in the present case were disposed of by *Douglas v. Faith Baptist Church, supra.*
>
> See App. B, *infra* at App. 1-2.

The Court then permanently enjoined the operation of a "private" school until the petitioners came into compliance with the "Nebraska statutes and the Rules and Regulations of the Department of Education governing Approved Schools."

Appeal was taken to the Nebraska Supreme Court, which found that the

> record discloses no genuine issues of fact and that the issues of law are controlled by our decision in State ex rel. *Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed,* 454 U.S. 803, 102 S.Ct. 75, 70 L.Ed.2d 72. See App. A, *infra,* at App. 4.

On December 5, 1983, respondent filed a Motion for Citation to Show Cause why petitioners should not be held

in contempt of the Summary Judgment directing them to cease operation of the church school until it complied with the Nebraska statutes. On December 15, 1983, the Lincoln County District Court held the defendants

> in willful contempt of the court order of March 7, 1983. The Court finds each defendant should be fined two hundred dollars ($200.00) per day, each day of violation of said Order, and the defendant Robert D. Gelsthorpe should report to the Lincoln County Sheriff's Office (not the jail) from 9:00 a.m. to 3:00 p.m. each day the school is in operation. See App. C, at App. 6.

For purposes of the contempt order, the two captioned defendants, North Platte Baptist Church and North Platte Christion School, were consolidated as one defendant. With one or two exceptions, Petitioner Gelsthorpe has been in the custody of the Sheriff's office on church school days since December 15, 1983, and fines have mounted against the petitioners in the amount of $400 each of the days the church school is in operation.

It is from the Summary Judgment ruling granting injunctive relief to the respondent that the petitioners pray a writ of certiorari issue.

REASONS FOR GRANTING WRIT

The Court below held that important and as yet unlitigated claims of violation of fundamental constitutional rights could be properly decided by summary judgment despite this Court's and federal courts of appeals' decisions to the contrary.

The Petitioners raised as affirmative defenses to alleged violations of the Nebraska school laws and regulations the issues of whether the application of those laws and regulations to petitioners impinges upon numerous rights guaranteed to them by both the United States and the Nebraska Constitutions. By means of the fact pleading of petitioners' answer to respondent's petition for injunction, the petitioners raised the factual issues of the free exercise of religion, establishment of religion, freedom of association, freedom of speech, ultra vires acts by the State of Nebraska which are violative of the petitioners' right to due process of law, the parental right to direct the religious training and education of children, and the right to exercise a calling in life as guaranteed by the United States Constitution. They also raised the issue of religious liberty as guaranteed by the Nebraska Constitution.

It is difficult to imagine more fundamental and precious constitutional rights being raised than those raised below as affirmative defenses. A defense is not a denial of the allegations, but is, in essence, an admission of the averments in the complaint but then sets up new matters that defeats the effect of the admissions. The sum and substance of the petitioners' affirmative defenses were that they are not in compliance with the school laws of the state because the school laws of the state are not applicable to them. Petitioners stood ready to prove those defenses, but were not so permitted. The respondents did not answer the new matters raised by those defenses; indeed, did not even introduce into evidence the regulations to which the petitioners are allegedly subject so that there

is no evidence that the regulations even apply to the petitioners. Neither do the petitioners comply with the Federal Aviation Administration regulations; but it is doubtful that they could be held to be in violation of them without some proof that regulations are applicable to them. Such a showing is even more imperative when allegations of violations of important constitutional rights are raised.

A substantial number of courts have taken the position that courts should be cautious in granting summary judgment in cases presenting complex issues of law or fact, and particularly in cases involving constitutional issues. *Perry v. Sinderman,* 408 U.S. 593, 598, 33 L.Ed.2d 570, 578 (1972); *Askew v. Hargrave,* 401 U.S. 476, 478-479, 28 L.Ed.2d 196, 199 (1971); *Aziz v. Lafeure,* 642 F.2d 1109, 1112 (2nd Cir. 1981) ("In any event, with the record in its present state we decline to reach the difficult constitutional question presented and remand for further development of the facts."); *Barker v. Norman,* 651 F.2d 1107, 1123 (5th Cir. 1981); *Minkus v. Metropolitan Sanitary Dist.,* 600 F.2d 80 (7th Cir. 1979); *Felix v. Young,* 536 F.2d 1126, 1135 (6th Cir. 1976) ("As we have stated on many occasions, without an adequate factual basis in the record, a District Court should be extremely hesitant to grant summary judgment on important and complex issues. . . . The adequacy of the record is particularly important where the court is called on to decide questions of constitutional law without benefit of a trial."); *Waldie v. Schlesinger,* 509 F.2d 508, 510 (D.C. Cir. 1974); *Bangor Baptist Church v. State of Maine,* 540 F.Supp. 1208, 1217

(D.Maine 1982) ("Courts normally permit the parties to present a complete factual record to facilitate the requisite balancing of first amendment claims."); *Hoover v. Holston Valley Community Hosp.*, 545 F.Supp. 8, 11 (E.D. Tenn. 1981) ("The rule is well-settled in this Circuit that a trial judge should be slow to dispose of an action of any complexity on such a motion [for summary judgment]. Where, as here, the Court is called upon to decide questions of constitutional law without the benefit of a trial, the adequacy of a record is particularly important."); *Lopez v. Modisitt,* 488 F.Supp. 1169, 1174 (W. D. Mich. 1980); *Pettinaro Const. Co., Inc. v. Delaware Authority, etc.*, 500 F.Supp. 559, 563 (D. Del. 1980) ("Besides being subject to the morally stringent prerequisites for the granting of summary relief, plaintiffs bear an added burden because of the important constitutional questions involved in this case. Although summary judgment motions are never to be granted on the basis of inadequate and controverted factual records, where constitutional issues of large public import are involved, the Court's scrutiny of the record, to ensure that there are no disputed issues of material fact, must be particularly exacting."); *Westfall v. Board of Comm. of Clayton Cty.*, 477 F.Supp. 862 (N.D. Ga. 1979).

In *Bangor Baptist Church v. State of Maine, supra,* the court had before it constitutional claims very similar to those raised by the petitioners herein. The Plaintiffs in that case were challenging under a free exercise claim the constitutionality, as applied to them, of the state's Compulsory School Attendance Laws. The amended complaint in *Bangor Baptist* alleged violations of the plain-

tiffs' guarantees of free exercise of religion, parental rights, freedom from establishment of religion, due process of law property, enterprise, and expression. *Bangor Baptist,* at 1214. For purpose of their motion for summary judgment the defendants conceded that the plaintiffs' claims were motivated by, and rooted in, legitimate and sincerely-held religious beliefs. The defendant contended instead that those religiously motivated beliefs were only minimally burdened by the challenged regulations. They argued that the court could, therefore, determine as a matter of law that the state's school laws served a compelling interest of the state so that the plaintiffs' religious beliefs could be overriden.

The District Court, however, disagreed with the appellants' argument, finding instead, that

> [t]he important interests competing for judicial protection in the context of constitutional challenges brought under the free exercise clause are rarely susceptible to the requisite balancing on motion for summary judgment.
>
> * * *
>
> Courts normally permit the parties to present a complete factual record to facilitate the requisite balancing of competing interests in considering *first amendment claims. Id.* at 1217. (emphasis added).

The "delicate questions" (*Wisconsin v. Yoder,* 406 U. S. 205, 215 (1972)) presented to the fact-finder by a variety of first amendment claims, requires a "difficult and sensitive fact-finding task" (*Stevens v. Berger,* 428 F. Supp. 896, 899 (N.Y.D.C. 1977)). Such a searching analysis, said the Distrct Court, requires at least a

> well-developed showing by affidavits, exhibits, regulations and the responses to them, . . . without factual dispute. . . . In such a case the defendants would, of course, have to carry the heavy burden of justifying a summary jdugment. *Bangor Baptist*, at 1217 [footnote 12] quoting *Developmental Disabilities Advocacy Center, Inc. v. Tuttle*, No. 81-1727, slip op. at 15-16 (1st Cir. September 22, 1982).

There was no "delicate," "sensitive" fact-finding in the decision below. The respondent's motion and affidavits for summary judgment neither addressed nor even alluded to the specific constitutional issues which were at the very heart of the affirmative defenses raised by the petitioners. Respondents merely alleged that the petitioners intentionally and knowingly violated the school laws and regulations, and because they admitted some of the factual allegations and did not deny others, that respondent was entitled as a matter of law to a judgment enjoining the defendants from further operation of the church school. To cut off the right of the petitioners to urge their constitutional defenses because there has been an admitted violation of the laws which have been challenged is to deny essence of a claim that a statute is unconstitutional either on its face or as applied. The issue of alleged or admitted violation of the laws and regulations challenged is completely irrelevant insofar as they relate to the constitutional claims raised as affirmative defenses. If anything, any failure to comply with those laws and regulations only highlights the serious nature of the constitutional issues they seek to have adjudicated and the need for an opportunity to present their claims in a full evidentiary hearing, since the respondent prayed for injunctive relief.

> There is a strong presumption against the constitutional validity of any restraint of future expression [cites omitted] . . .
>
> Religious worship and discussion, integral aspects of the curricula of . . . church schools, constitute forms of speech and association entitled to full First Amendment protection. *Bangor Baptist Church v. Maine,* 576 F. Supp. 1299 (D. Maine 1982).

The respondents did not overcome the strong presumption against the use of prior restraint of the petitioners' constitutional rights.

The Federal District Court for the District of Nebraska has been presented with claims almost identical to those raised below. The plaintiffs in the case of *Ohlmann, et al. v. Douglas, et al.,* No. CV-82-L-467 (D.C. Ne.) sought a declaration that the Nebraska school laws were in violation of among others their First, Ninth and Fourteenth Amendment guarantees and of their right to religious liberty as guaranteed by the Nebraska Constitution. The defendants' motions for dismissal were granted with regard to the allegations of paragraphs 41(e) and (g) that the school laws constituted unconstitutional violation of the free exercise of religion guaranteed by the First Amendment to the United States Constitution and by Article I, Sec. 4 of the Nebraska Constitution; and unconstitutional violation of the parental right to guide and direct the education and upbringing of their children as secured by the First, Ninth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 1, 3, 4 and 26 of the Nebraska Constitution. The Honorable Judge Urbom was persuaded that in *Douglas v. Faith Baptist Church, supra,*

> the Supreme Court of Nebraska clearly and directly decided the two constitutional issues before it: whether "[e]nforcement of the school laws violates the defendants' ninth amendment right to bear, raise, and educate their children as they set fit" and whether "[e]nforcement of the school laws violates the defendants' first amendment rights as to freedom of religion." 207 Neb. at 803; *Ohlmann, supra,* (D. Neb. Dec. 30, 1982) (memorandum and order on motions to dismiss and motion to certify class), 3-4. (See Appendix D, at App. 10.)

Left intact by the December 30, 1982, order were allegations in paragraphs 41(a) - (d) and (f) that:

> (a) The School Laws and Rules 14 and 21 are so vague, particularly in an area touching First Amendment freedoms, as to be unconstitutional on their face.
>
> (b) The School Laws and Rules 14 and 21 are so overbroad in scope as to be unconstitutional on their face.
>
> (c) The School Laws and Rules 14 and 21 could constitute an excessive enanglement of government with religious exercise, and therefore an unconstitutional infringement on the First Amendment to the United States Constitution and Article I, Sec. 4 of the Bill of Rights in the Nebraska State Constitution.
>
> (d) The School laws and Rules 14 and 21 comprise a deprivation of the right of association and privacy of association.
>
> * * *
>
> (f) The School Laws and Rules 14 and 21 constitute an invasion of the right of Plaintiffs to be free from unreasonable search and seizure. *Ohlmann, supra,* (D. Ne. complaint, filed 1982), 20-21.

The plaintiffs thereafter moved the Court to reconsider its December 30, 1982, order insofar as the allegations of violations of the Nebraska Constitution were concerned. On March 16, 1983, within ten days of the Summary Judgment Order at issue herein the court amended his earlier order with regard to the allegations raising the Nebraska Constitution issues of religious freedom and parental rights. The Court found that

> [t]he thrust of the State's motion to reconsider is the claim that the school laws and rules at issue are in violation of the Nebraska State Constitution. The plaintiffs' observation that the *Faith Baptist Church* case did not decide any religious rights guaranteed by the Nebraska Constitution is correct.
>
> • • •
>
> The provisions of the Nebraska Constitution are not worded at all like those of the United States Constitution. What the words of the Nebraska Constitution mean ought to be decided by the Supreme Court of Nebraska, not only because these plaintiffs and these defendants will be directly affected by such a decision, but others in similar positions also will be. A surer-footed reading of Nebraska law can be found in Nebraska's courts, rather than the federal courts. I have no doubt that the meaning of the Nebraska Constitution as it relates to the rights of parents, teachers, students in nonpublic schools will be resolved definitely in other litigation already pending or to be pending in the course of time in the state courts of Nebraska, some of which has already been identified by the parties to this case. *Ohlmann, supra,* (March 16, 1983) (memorandum and order on motion for reconsideration and motion to dismiss). (See Appendix E, at App. 13-15.)

The plaintiffs' claims raised under the Nebraska Constitution were therefore dismissed, but done so "without prejudice, so that they may be pursued in the state courts." *Id.* The state courts, however, though squarely faced with both the Nebraska Constitution claims and the claims similar to those left remaining in the *Ohlmann* complaint, have failed to make the resolution expected by the Federal District Court. Rather, in the case herein, the courts have merely looked to see if there were admitted or not denied violations of statutes. Since there were, summary judgment was granted for intentional, knowing violation of the statutes without opportunity being provided to present constitutional defenses to any such violations.

Once again, the *Ohlmann* case presented the Federal District Court for the District of Nebraska with the identical issue which was decided contrary to the decisions herein. After the *Ohlmann* complaint survived the defendants' motions for dismissal largely intact, the defendants moved for summary judgment on the ground that plaintiffs

> have intentionally and knowingly violated a number of state laws dealing with teacher certification and compulsory school attendance. The appellants filed two affidavits in support of the motion; they did not submit a supporting brief.
>
> I note, first, that whether the plaintiffs intentionally and knowingly violated state law is a question of fact. *Ohlmann, et al. v. Douglas, et al.*, No. CV 82-L-467 (D.Neb. June 7, 1983) (memorandum and order on motion for summary judgment). (See Appendix F, at App. 17.)

By this order, the District Court reaffirmed the decisions of this Court and other federal courts that due process of law at the very least mandates a material factual showing that there has been an intentional and knowing violation of the law without excuse. This requisite is magnified when those very laws are facing challenges as to their constitutionality; challenges so sincere and genuine that Petitioner Church and Petitioner Gelsthorpe have each submitted to a two hundred dollar-a-day fine and Petitioner Gelsthorpe has repeatedly and voluntarily placed himself in the custody of the Lincoln County, Nebraska, Sheriff each day they desire to carry out their God given commands and exercise what they believe to be their constitutionally protected rights. The loss of physical freedom and property is a most heavy price to exact of a church and an individual for the privilege of following their God and exercising their rights; but it is a price that petitioners have demonstrated they will pay to assure the children of this church and of this pastor an education which they believe to be superior academically and are certain is superior spiritually.

The petitioners need the assistance of this Court. They are pleading not only for their own religious and constitutional liberties against the wealth and power of the State of Nebraska. The stand they have taken and the sanctions they are undergoing is one that is being faced in church after church across the State of Nebraska and in state after state across the United States. (*See* "The Report of The Governor's Christian School Issue Panel," Transmittal Letter, January 26, 1984). (Appendix G, at App. 18; 27). It is one that the Legislature of the State

Nebraska recognized on April 5, 1984, by passing legislation which offers an alternative to parents and church schools which believe that the regulations adopted by the State Board of Education "violate sincerely-held religious beliefs." Sections 79-201, 79-328, and 79-1701, Reissue Revised Statutes of Nebraska, 1943, as amended by an Act Relating To Schools, LB 928 (April 5, 1984). (See Appendix H, at App. 68). While that new legislation may do much to relieve the high price the petitioners will need to pay for their constitutional and religious liberties, it does not relieve what they have already been forced to suffer because of the lack of opportunity to present their constitutional and religious claims. Once the doors of the courts of Nebraska had been closed to them, the petitioners were left with three alternatives: to continue to exercise their unlitigated religious and constitutional rights under actual quasi-criminal sanctions, forego those rights, or leave the State of Nebraska for "some other and more tolerant region." *Yoder, supra* at 218. These alternatives left the petitioners in "precisely the kind of objective danger . . . that the First Amendment was designed to prevent." *Id.* Petitioners contend that before they are forced to choose any of these unpalatable alternatives, they should at least be given the opportunity to demonstrate how the Nebraska school laws unconstitutionally threaten and burden their freedom to conduct the doctrine of the church as they desire, exercise their personal religious faith as they are commanded by God to do, and freely associate and speak to further their personal, religious, educational, and political philosophies.

———o———

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinions of the Supreme Court of Nebraska.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT
IN AND FOR LINCOLN COUNTY, NEBRASKA
Docket 84 Page 85

STATE OF NEBRASKA, ex rel
CHARLES A. KANDT, Lincoln County Attorney,

Plaintiff,

vs.

NORTH PLATTE BAPTIST CHURCH OF
NORTH PLATTE, NEBRASKA, A Corporation;
NORTH PLATTE CHRISTIAN SCHOOL,
North Platte, Nebraska; and
ROBERT D. GELSTHORPE,

Defendants.

SUMMARY JUDGMENT

NOW ON this 28th day of February, 1983, the above entitled cause came on before the Court for a hearing on plaintiff's Motion of Summary Judgment. The plaintiff, State of Nebraska, was represented by Charles A. Kandt, County Attorney of Lincoln County, Nebraska. The defendants were represented by their counsel, David C. Gibbs, Jr. and Richard W. Moore, both of Cleveland, Ohio, and George Clough, local counsel.

Evidence was adduced by affidavits. Oral arguments were made by counsel. The defendants submitted a written brief. Plaintiff was given until March 2, 1983, to submit a written brief. The cause was taken under advisement.

March 7, 1983.

The Court, having received and read the briefs and being well and fully advised in the premises finds that there is no genuine issue of fact. The Court further finds

that the defendants' contention that all the issues involved herein were not disposed of by *Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571 (1981) is without merit. All issues in the present case were disposed of by *Douglas v. Faith Baptist Church,* supra. The Court finds that it is undisputed that each of the defendants is participating in the operation of the school contrary to law. Therefore the Court finds that the motion for summary judgment should be sustained and that the petition for injunctive relief should be granted.

IT IS THEREFORE ORDERED that the motion for summary judment is sustained.

IT IS FURTHER ORDERED that defendants and each of them are permanently injoined from further operation or participation in the operation of a private school or the using of church property for the operation of a private school until such time as the church school involved has received Approved School status and has compiled with the Nebraska statutes and the Rules and Regulations of the Department of Education governing Approved Schools.

Defendants shall pay all costs herein.

Dated this 10th day of March, 1983.

By the Court:
/s/ Keith Windrum
District Judge

APPENDIX B

STATE EX REL. KANDT

v.

NO. PLATTE BAPTIST CH.

NO. 83-409

Filed March 2, 1984

Summary Judgment. Where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law, summary judgment is a proper remedy.

Krivosha, C.J., Boslaugh, White, Hastings, Caporale, Shanahan, and Grant, JJ.

PER CURIAM.

This was an action brought by the county attorney of Lincoln County, Nebraska, to enjoin the defendants from operating the North Platte Christian School in North Platte, Nebraska, without complying with the school laws of the State of Nebraska. The defendants answered that their religious convictions prevented them from complying with the school laws and that the laws in question violated the free exercise clause of the first amendment to the Constitution of the United States and other provisions of that Constitution and the Constitution of Nebraska.

The trial court sustained the plaintiff's motion for a summary judgment and entered a permanent injunction against the operation of the school until there had been compliance with the school laws. The defendants have appealed.

The record discloses that there are no genuine issues of fact and that the issues of law are controlled by our decision in *State ex rel. Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed* 454 U.S. 803, 102 S.Ct. 75, 70 L.Ed.2d 72. The summary judgment in favor of the plaintiff was properly entered.

The judgment is affirmed.

AFFIRMED.

APPENDIX C

IN THE DISTRICT COURT
IN AND FOR LINCOLN COUNTY, NEBRASKA

Case No. 84-85

THE STATE OF NEBRASKA, ex rel
CHARLES A. KANDT, Lincoln County Attorney,

Plaintiff,

v.

NORTH PLATTE BAPTIST CHURCH OF NORTH PLATTE, NEBRASKA, A Corporation; NORTH PLATTE CHRISTIAN SCHOOL, North Platte, Nebraska; and ROBERT D. GELSTHORPE,

Defendants.

ORDER
(Filed December 15, 1983)

NOW ON this 15th day of December, 1983, this matter comes on for hearing to show cause before me, the Honorable John P. Murphy, one of the District Court Judges in and for Lincoln County, Nebraska. The State is represented by Lincoln County Attorney Charles A. Kandt. The defendants are represented by their attorneys Richard Moore of Ohio, and George Clough, local counsel.

THEREUPON, this matter comes on for hearing. Evidence is adduced by the State in the form of a deposition of the defendant Robert D. Gelsthorpe, and the State rests. The defendants rest without adducing evidence. The Court recesses to read the deposition.

The Court reconvenes with the same parties present as before. Arguments are made by counsel, and a statement is made to the Court by the defendant Robert D. Gelsthorpe.

The Court finds the defendants are in willful contempt of the court order of March 7, 1983. The Court finds each defendant should be fined two hundred dollars ($200.00) per day, each day of violation of said Order, and the defendant Robert D. Gelsthorpe should report to the Lincoln County Sheriff's Office (not the jail) from 9:00 a.m. to 3:00 p.m. each day the school is in operation. The Lincoln County Sheriff should inspect the school each day, as inconspicuously as possible, to determine if the school is in operation.

So Ordered.

This order shall commence Monday, December 19, 1983; and this order shall be lifted from 9:00 o'clock a.m. on December 22, 1983 through 9:00 o'clock a.m. on January 3, 1984.

The State and Defendants join in a motion to consolidate the captioned defendants North Platte Baptist Church, a corporation, and North Platte Christian School. The Court grants the motion and the two said captioned defendants shall be consolidated as one defendant for the purposes of this Order.

Defendants move for a supersedeas bond. The motion is taken under advisement.

SO ORDERED BY THE COURT:

District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-467

REV. ROBERT OHLMANN, et al,

Plaintiffs,

v.

PAUL DOUGLAS, et al,

Defendants.

MEMORANDUM AND ORDER ON
MOTIONS TO DISMISS AND
MOTION TO CERTIFY CLASS

(Filed December 30, 1982)

I.

Motions to Dismiss

The pending motions to dismiss, filings 20, 21, 22, 23 and 24, are almost entirely duplicative of earlier motions by the same parties to dismiss, filings 7, 8, 10, 11 and 12. No brief was submitted—by assent of opposing counsel and the court—in support of the earlier motions to dismiss, and in my memorandum of November 1, 1982, I discussed only the issue as I understood it from the oral statements of counsel. I shall adhere to the ruling on the issue I discussed in the November 1 memorandum, filing 18, on the same grounds I set out in that memorandum.

In the brief submitted in support of the pending motions to dismiss other arguments are made. I shall discuss them serially.

The first urging is that there is no subject matter jurisdiction in this court. The argument centers upon the

claim that the plaintiffs have not shown that they have suffered any injury. This, however, is the standing argument which I rejected in my memorandum of November 1. Tit. 28 U.S.C. §§ 1343 and 1331 are the statutes granting jurisdiction.

The brief separately asserts that the plaintiffs have no standing because they have suffered no actual or threatened harm. That, again, is the same argument.

Also included in the brief is a suggestion that there has been a failure to join an indispensable party, the State Board of Education. No citation of authority is given, and I doubt that the Board is an indispensable party. As far as I know, the Board is not the one who enforces its rules, although it makes them. The lawsuit is to enjoin enforcement of rules, not to enjoin the making.

Another argument which is made within the brief as supportive of the defendants' position that there is no subject matter jurisdiction is that the decisions of the Supreme Court of Nebraska in *State of Nebraska v. Faith Baptist Church of Louisville, Nebraska,* 207 Neb. 802, 301 N.W.2d 571 (1981), and the affirmance of that decision by the Supreme Court of the United States forecloses this court's relitigating the issues raised in the present case. That argument has merit, although I think it more clearly is subsumed within the classification of failing to state a claim upon which relief may be granted.

The Supreme Court's entire statement in affirming the *Faith Baptist* decision was:

> "Appeal from Sup. Ct. Neb. dismissed for want of a substantial federal question. Justice O'Connor took no part in the consideration or decision of this case. Reported below: 207 Neb. 802, 301 N.W.2d 571."

Faith Baptist Church of Louisville, Nebraska v. Nebraska ex rel. Douglas, 454 U.S. 803 (1981).

Previous opinions of the Supreme Court of the United States have set the significance of a dismissal by that court for want of a substantial federal question. In *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 182 (1979), the court said:

> " . . . [P]recedential effect of a summary affirmance can extend no farther than the precise issues presented and necessarily decided by these actions."

In *Mandel, Governor of Maryland v. Bradley,* 432 U.S. 173, 176 (1977), the court said:

> " . . . Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.
>
> * * *
>
> "Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenge presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by these actions. After *Salera* [*Tucker v. Salera,* 424 U.S. 959 (1976), affirming 399 F.Supp. 1258 (U.S.D.C. E.D.Pa. 1975), which declared unconstituional a Pennsylvania law setting a deadline for an independent candidate to gather signatures to win a place on a ballot], for example, other courts were not free to conclude that the Pennsylvania provision invalidated was nevertheless constitutional. Summary actions, however, including *Salera,* should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved."

See, also *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* 439 U.S. 463, n. 20 (1979).

In the *Faith Baptist Church* case the sole questions presented to the Supreme Court of the United States were:

> "1. Whether The Nebraska Educational Statutes And Rules Promulgated By The Nebraska State Department Of Education Pertaining To State Approval Of Church-Schools And Teacher Certification, On Their Face And As Applied, Deprive Appellants Of The Free Exercise Of Their Religion In Violation Of The First Amendment Of The United States Constitution.
>
> "2. Whether The Nebraska Educational Statutes And Rules Promulgated By The Nebraska State Department Of Education Pertaining To State Approval Of Church-Schools And Teacher Certification, On Their Face And As Applied, Violates The Individual Appellants' Fundamental Rights To Bear, Raise And Educate Their Children As Provided For Under The Ninth And Fourteenth Amendments To The Unted States Constitution."

Although the plaintiffs argue that the Supreme Court of the United States may have decided that the Supreme Court of Nebraska (1) decided that the plaintiffs had not shown any burden on their constitutional rights and therefore (2) did not reach any constitutional issue, I am persuaded that the Supreme Court of Nebraska clearly and directly decided the two constitutional issues before it: whether "[e]nforcement of the school laws violates the defendants' ninth amendment right to bear, raise, and educate their children as they see fit" and whether "[e]nforcement of the school laws violates the defendants' first amendment rights as to freedom of religion." 207 Neb. at 803. Furthermore, the Supreme Court of Nebraska did not say or intimate that the school laws were no burden to the parties' religious rights. It rather balanced the burden against the interest of the state and found the

burden to be minimal and the suggested alternative means to be unsatisfactory. To the extent that the court in *Bangor Baptist Church v. State of Maine,* Civil 81-0180-B (unpublished opinion, U.S.D.C. Maine), analyzes the Nebraska case differently, I respectfully think it is mistaken. Those two precise constitutional issues were the only ones submitted to the Supreme Court of the United States and that court could not reasonably have had any other issues in mind when it declared that there was presented no substantial federal question. The plaintiffs here may disagree with the holding of the Supreme Court of the United States—as anyone else may disagree—but it is the law and remains so on those two issues until that court tell us differently.

Accordingly, the motions to dismiss must be granted as to those two issues.

II.

Certification of a Class

A particular problem permeates the request for certification of a class—definition of the putative class. Once that is resolved the necessary features of Rule 23 can be analyzed, but not before then.

The plaintiffs' complaint at paragraph 4 describes the class as "themselves and all other teachers, parents, and students of Christian church-schools in the State of Nebraska similarly situated." That literaly means, perhaps, all teachers, parents and students affiliated with schools operated by any church which adheres to some version of the Christian religion. Under such an expansive defenition I should have doubt, for example, that all teachers, parents and students affiliated with schools op-

erated by churches of the Lutheran and Roman Catholic persuasion would have claims typical of the claims presented by these present plaintiffs. A more narrowly worded definition might avert that problem, but I should not undertake to modify the proposed definition without affording to counsel the opportunity to have their say about it.

Furthermore, it appears to me that, however a class might be defined, it should not be broad enough to include persons whose claims similar to the onees presented in this case have already been adjudicated. The identity of those persons can best be made with the assistance of counsel. None of this is to say that I think a class should be or should not be certified. It is to say that I cannot tell—it may depend upon the definition.

Therefore, I shall withhold for now a ruling on the motion to certify. Perhaps a hearing will be necessary; if counsel think so, they should say so.

IT THEREFORE HEREBY IS ORDERED:

1. That the motions to dismiss, filings 20, 21, 22, 23 and 24, are granted as to the issues stated in paragraphs 41(e) and (g) of the complaint and otherwise are denied; and

2. That counsel for the plaintiffs shall have until January 10, 1983, to respond by brief or letter with their suggestions regarding definition of a proposed class, and counsel for the defendants shall have until January 17, 1983, to respond in similar manner to the same issue.

Dated December 30, 1982.

By The Court
/s/ Warren K. Urbom
Chief Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-467

REV. ROBERT OHLMANN, et al,

Plaintiffs,

v.

PAUL DOUGLAS, et al,

Defendants.

MEMORANDUM AND ORDER
ON MOTIONS FOR RECONSIDERATION
AND MOTION TO DISMISS

(Filed March 16, 1983)

Both sides ask that I try again to decide issues favorably to them. The defendants by filing 42 ask again that the case be dismissed for principles of sovereign immunity, lack of jurisdiction, failure to state a claim upon which relief may be granted, and failure to join an indispensable party. These points have been made and decided before, except that the defendants now show that the defendant Howland is no longer County Attorney for the County of Dawes and that Patrick Connealy is in that office. I shall not repeat by rationale for rejecting the first three bases. As to the fourth, the plaintiffs show that ule 25(d)(1) of the Federal Rules of Civil Procedure provides that when a public officer who is a party leaves office the action does not abate and the successor is automatically substituted as a party. Patrick Conealy has therefore been substituted for William L. Howland as a party defendant. The motion to dismiss will be denied.

The plaintiffs by filing 37 ask that the order of December 30, 1982, granting in part motions to dismiss be reconsidered. The thrust of the motion to reconsider is

the claim that the school laws and rules at issue are in violation of the Nebraska State Constitution. The plaintiffs' observation that the *Faith Baptist Church* case did not decide any religious rights guaranteed by the Nebraska Constitution is correct. It does not follow, however, that the claim based on the Nebraska Constitution should remain for this court to decide. It is a pendent claim over which the federal court has power to act but over which the federal court is not required to act. *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726-727 (1966) states:

> " . . . its [pendent jurisdiction] justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them . . . Needless decisions of state law should be avoided, both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. . . ."

The provisions of the Nebraska Constitution are not worded at all like those of the United States Constitution. What the words of the Nebraska Constitution mean ought to be decided by the Supreme Court of Nebraska, not only because these plaintiffs and these defendants will be directly affected by such a decision, but because others in similar positions also will be. A surer-footed reading of Nebraska law can be found in Nebraska's courts, rather than the federal courts. I have no doubt that the meaning of the Nebraska Constitution as it relates to the rights of parents, teachers, and students in nonpublic schools will be resolved definitively in other litigation already pending or to pending in the course of time in the state courts of Nebraska, some of which has already been iden-

tified by the parties to this case. To have those issues proceed toward a decision in a federal court, paralleling state litigation, would constitute neither judicial economy nor convenience nor fairness to litigants.

Accordingly, I shall deny the motion for reconsideration, filing 37, except that my ruling should be clear that the dismissal of claims arising from the Nebraska Constitution is without prejudice, so that they may be pursued in the state courts.

By filing 43 the plaintiffs repeat the request of filing 37 and also ask that the court reinstate the allegations of the complaint that the school laws and rules at issue violate the Constitution of the United States. In the alternative filing 43 asks that the order of December 30, 1982, be rescinded and the plaintiffs be allowed to submit a brief opposing the defendants' motions which were the subject of the December 30, 1982, order. This alternative is requested on the ground that the defendants' brief on the defendants' motions was not received by the plaintiffs until December 28, 1982, and the court's decision was made December 30 without opportunity for the plaintiffs to respond to the defendants' brief. I am quite willing to receive from the plaintiffs a brief in response to the defendants' brief and shall give them time to submit one. I shall leave the order of December 30 in place until I conclude that it needs to be revised.

IT THEREFORE IS ORDERED:

1. That the plaintiffs' motion of reconsideration, filing 37, is denied, except that the order of December 30, 1982, is amended to state that the dismissal of the allega-

tions of paragraphs 4(e) and (g) of the complaint, insofar as those allegations are of claims arising from the Nebraska State Constitution, is without prejudice;

2. That the plaintiffs' supplemental motion for reconsideration, filing 43, is denied, except that the plaintiffs shall have until March 29, 1983, in which to submit a brief opposing the defendants' motion to dismiss, filings 20, 21, 22, 23 and 24, and the defendants shall have seven days after receipt of the plaintiffs' brief in which to reply to that brief; and

3. That Patrick Connealy, County Attorney of Dawes County, Nebraska, is substituted for William Howland, County Attorney, as a party defendant; filing 42 otherwise is denied.

Dated March 16, 1983.

By The Court
/s/ Warren K. Urbom
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-467

REV. ROBERT OHLMANN, et al,

Plaintiffs,

v.

PAUL DOUGLAS, et al,

Defendants.

MEMORANDUM AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

(Filed June 7, 1983)

The defendants by filing 47 have moved for a summary judgment on the ground that the plaintiffs have intentionally and knowingly violated a number of state laws dealing with teacher certification and compulsory school attendance. The defendants filed two affidavits in support of the motion; they did not submit a supporting brief.

I note, first, that whether the plaintiffs intentionally and knowingly violated state law is a question of fact. I note also that Local Rule 20C provides that if a moving party fails to submit a brief in support of the motion, the court may treat the motion as abandoned. I shall do that.

IT THEREFORE IS ORDERED that the defendants' motion for summary judgment, filing 47, is denied.

Dated June 7, 1983.

By The Court
/s/ Warren K. Urbom
Chief Judge

APPENDIX G

THE REPORT OF THE GOVERNOR'S CHRISTIAN SCHOOL ISSUE PANEL

JANUARY 26, 1984

THE REPORT OF THE GOVERNOR'S CHRISTIAN SCHOOL ISSUE PANEL

TRANSMITTAL LETTER

January 26, 1984

The Honorable Robert Kerrey
Governor of Nebraska
State Capitol
Lincoln, Nebraska 68509

Dear Governor Kerrey:

On December 12, 1983, you created the Governor's Christian School Issue Panel and charged it to "examine and report on public policy questions surrounding the Christian School issue in Nebraska".

I respectfully submit to you the report of this panel. We commend you for your keen interest in this important issue and thank you for allowing us to participate in the study of it.

We owe much to (a) the many people with whom we spoke and corresponded, (b) the authors of the vast number of reference materials we studied, and (c) your considerate staff members . Although our thanks go to all of these persons our recommendations are our own, for which we take full responsibility.

This issue presents profound and difficult challenges. Nonetheless, we believe that it can be resolved in a re-

sponsible manner because of the inherent good sense of Nebraskans and our state's tradition of fairness.

Very truly yours,

/s/ Robert M. Spire
Chair

RMS:sa
enclosure

THE REPORT OF THE GOVERNOR'S CHRISTIAN SCHOOL ISSUE PANEL

January 26, 1984

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2.

REPORT SUMMARY

Nebraska has an obligation to assure that children receive a good education. This means adequate training in basic skills and a knowledge of how our system of government works. The goal is to develop persons who can function constructively as adults and contribute to the welfare of others.

Nebraska carries out its educational responsibilities through laws and regulations which establish that all schools in Nebraska, both public and private, meet certain requirements. Chief among these requirements are those for (a) teacher certification, (b) courses of study, (c) material and equipment, and (d) grades and promotion. In addition, there are requirements regarding (a) compulsory education, (b) health and safety, and (c) fire regulations. Many education leaders consider these requirements essential for the State to fulfill its obligation to assure that Nebraska children are well educated.

There are some Christian schools which object to these State requirements on religious grounds. They assert that their educational efforts are an extension of their church ministry. From this they conclude that since the State cannot control religion it cannot regulate their schools. Thus, the State's desire to enforce its regulations is directly opposed by the church schools' denial of the State's right to do so as to them.

What is needed is an appropriate balance between the legitimate interest of the State in the education of Nebraska youth and religious freedom. Objectivity and balance are essential to a constructive resolution of this issue.

Can this conflict be resolved? Yes, and without a lot of difficulty. *If so, how?* We suggest this:

1. For church-related private schools Nebraska policy should be modified to create this exemption from present state requirements:

If all parents of children attending a church-related private school so elect, testing of their children shall be acceptable as an alternative to curriculum, teacher certification and related requirements for the school. These tests should be of a standardized nature recognized by the State Department of Education and educators as proper indicators of student progress. They should be administered annually by the County Superintendents. If the average test scores in each content area and at each grade level of all students enrolled in a school are at least equal to such average test scores of students in Nebraska public schools (or, if scores are not available for Nebraska public school students, then the nation as a whole), the school attended by these students need not meet the State curriculum, teacher certification and related requirements.

2. Parents who elect this alternative shall make a written representation to the State that (a) their religious beliefs dictate this choice, (b) they consent to a testing procedure for their children, and (c) they will supply regularly to the State evidence that their children are (1) meeting State mandatory school attendance requirements and (2) receiving a structured program of education

which satisfactorily covers all basic areas of study included in State curriculum standards and is conducted with physical facilities and instructional equipment and materials comparable to State standards. If the parents (a) fail to comply with these procedures, (or their representations to the State are inaccurate), or (b) their children test below the prescribed averages, then their children will be considered to be in violation of State mandatory school attendance requirements.

3. Health, safety and fire regulations for church-related private schools shall remain as they are.

4. The result of this exemption is this: Church-related private schools, for reasons of the religious conscience of the parents of the children attending them, may operate without seeking a license or obtaining approval from the State. The parents of the students involved shall (a) submit their children to a testing procedure, and (b) report directly to the State compliance with mandatory attendance, basic curriculum and related requirements.

This would seem to be a just and reasonable recognition of (a) religious and parental rights, and (b) the freedom of Christian schools to exist. At the same time, it leaves intact the basis for health and safety standards, fire regulations and compulsory education. The election to seek this exemption can only be made for reasons relating to religious freedom.

We make these recommendations because we have concluded:

(a) Nebraska teacher certification procedures as presently defined violate the First Amendment free exer-

cise of religion rights of Christian schools. This legal conclusion, together with our view of proper public policy, indicates to us the need to modify present practices in order to reach an appropriate accommodation between the interest of the State and religious freedom rights.

(b) The accommodation we suggest meets the religious issue without unreasonably interfering with the ability of the State to assure a competent education for Nebraska children and to establish standards for that education.

Our report describes how and why we have reached our conclusions. Reasonable people disagree as to what specific steps should be taken to resolve this issue. We recognize that our suggestions are simply one approach.

More important right now than any specific proposals is a recognition by all concerned that there are both educational and religious issues involved here which must be addressed in some form.

We hope that Nebraskans can agree on the common goal of recognizing (a) the State's obligation to have and enforce educational standards and (b) the legitimacy of religious freedom claims that some present State regulations are too restrictive when applied to Christian schools. This means that both State control and Christian school advocates must acknowledge some validity in the other's position. With this understanding we can then consider methods for accommodating these conflicting interests without compromising either (a) the obligations or standards of the State, or (b) the deeply felt religious convictions of Christian school supporters.

3.

WHAT ARE THE ISSUES?

There are profound issues about education, religion, constitutional rights, fairness and our responsibilities to each other involved. It is crucial that we clearly understand the actual nature of these issues.

We all seek the best possible education for our children; we also cherish our religious freedom. And we want to treat one another fairly and with respect. Governmental policies should accommodate all of these fundamental concerns.

The present Nebraska controversy has arisen in this manner:

(1) Nebraska law establishes State responsibility for and control of education. The reason for this law is the State's interest in the intellectual and cultural development of its children so that they may become responsible citizens. The legal basis of this law is threefold: (a) The Nebraska State Constitution; (b) Statutes enacted by the Nebraska Legislature; and (c) Court decisions.

This State law creates the Nebraska State Department of Education as the agent of the State to administer this responsibility. To carry out its duties the Department devises and enforces detailed regulations. These regulations, together with the law itself, require both public and private schools to be licensed by the State.

To receive a license a school must make application to the Department, which will issue the license only if it approves the school. It will approve the school only if the

school meets certain standards for (a) teacher certification and qualification, (b) courses of study, (c) material and equipment, (d) grades and promotion, and (e) mandatory student attendance. The Department asserts that schools which do not obtain this approval may not operate legally.

The State considers its direct control over teacher qualifications and other educational factors essential for it to fulfill its responsibility for the education of Nebraska children. It believes that meaningful education cannot take place in a classroom without *some* minimum *state*-determined control over what happens in that classroom (teacher qualifications, courses of study and related items).

(2) Several religious groups operate private schools in Nebraska. These schools enjoy fundamental rights derived from (a) the First Amendment to the United States Constitution, which guarantees to each person the right to "the free exercise of religion"; and (b) Article I, Section 4, of the Nebraska State Constitution, which contains a similar freedom of religion guarantee.

Most of these church-related schools consent to the State licensing rule and comply with the standards established by the State as a requirement for approval of the license. Some do not, however, and thus are denied legal status by the State. Among those who do not are some schools which may in fact fulfill the standards for approval, but refuse to apply for a license on the basis that the licensing procedure is itself an improper interference with their religious freedom. Others do not meet the standards for approval; they also refuse to accept the

licensing procedure for the same religious freedom reason.

These groups recognize that the State has an interest in the education of their children. However, they assert that this State interest is limited to the results of the educational process, not to the process through which those results are obtained. They believe that their church school is an integral part of, and thus an extension of, their church ministry. From this they conclude that any State regulation of their school is in substance a regulation of their church and thus an improper State interference with their religion. In summary, they assert that the State's legitimate interest in the education of their children is only in the *result* of that education, *not* the *process* by which that result is obtained.

Stated another way, these church groups view State regulation of their schools as a control of process (which they consider to be a control over their churches). On the other hand, they view the State's interest in the results of the process (how well the students learn) as a matter between the State and the parents of the children (and thus not a control over the church in its educational ministry). They consider their schools to be responsible to the parents, not to the State.

They place great accountability upon the parents for the education of their children. They consider the essential responsibility for the education of the children to be upon the parents.

In short, they say that the State may require that their children actually learn certain basic skills, but that the State may not dictate to their church schools how these

skills are learned. Therefore, they believe that the State infringes upon their religious liberty through certification of teachers and other requirements placed directly upon their schools.

(3) An impasse has developed. Some church schools insist on operating without meeting State requirements. The State responds by seeking enforcement of its requirements through closing noncomplying schools.

Can these competing interests of the State and these schools be accommodated in a manner which is properly responsive to the responsibilities, convictions and constitutional rights of both? We definitely think so.

Our recommendations are based on these three premises, to which we full subscribe: (1) the conflicts here are very real; (2) these conflicts should be addressed directly and clearly; and (3) sound State educational policies and proper Christian school religious liberties can coexist.

4.

HOW DO OTHER STATES HANDLE THESE ISSUES?

There is considerable diversity.

A 1980 Florida Department of Education survey disclosed that thirteen states require private schools to hire state certified teachers. Two of these states exempt church-related schools and two others indicate that they do not enforce the law. Thirteen states do not certify private school teachers and twenty-four have a voluntary certification process.

Recent information compiled by the Nebraska State Department of Education is similar. This information shows that fourteen states require some form of teacher certification and thirty-five states do not. Precise information is lacking from one state. For private schools this information indicates that nine states virtually ignore them, eighteen states have a voluntary regulation system for them and twenty-one states have some compulsory requirements. Detailed information is lacking from two states.

In short, other states appear to do one of two things: (1) have mandatory certification requirements similar to Nebraska which they may or may not enforce; (2) exempt church-related schools from some or all state regulations. Among these are some who provide for a voluntary certification procedure for those church-related schools who want to have state approval.

We cannot get a great deal of guidance from other states. Why not? Because this Christian school regulation issue is a recent event. It is not something which states have been giving serious attention to for a long time. In addition, the First Amendment freedom of religion question involved in the regulation of Christian schools has not yet been clearly resolved through judicial proceedings.

Other states are observing closely what Nebraska does with this issue for whatever guidance our state may be to them.

In summary, we have a social and constitutional issue here which we must work out ourselves without much help from others.

5.

WHAT GENERAL CONSIDERATIONS INFLUENCE THESE ISSUES?

We need to recognize that this Christian school issue does not exist in isolation. It is just one aspect of the much larger overall concern our nation has for church/state relationships in their many forms. In addition, there are a number of political, social, intellectual, and spiritual factors which relate directly to the issue. As we attempt to resolve it we should be aware of these influences:

(1) All would agree that education has perhaps the largest role in ensuring the future of democracy today. Our children must receive a good education in order to become constructive adults.

(2) There are many fine people in Nebraska and elsewhere who resent interference in their lives by what they consider to be "big brother social engineering" of an Orwellian nature. Typically these people are hard-working, thrifty, prudent, God-fearing and very reliable. You could not ask for more loyal or dependable friends. They are in every way as essential to the functioning of our social system as are those who are more in sympathy with modern governmental regulation of our lives. They simply want to be left alone. They are worried about the possible sacrifice of their indivduality to group conformity. In our democratic and pluralistic society who can presume to say that the hopes and desires of these persons are any less important than those of others?

(3) In discussing this Christian school issue, we sometimes tend to categorize interested persons as "the

citizens of Nebraska" and "the Christian school people". We should remember that there is one group here, not two. The Christian school people are just as much Nebraska citizens as anyone else and should be so recognized. Nebraska belongs equally to all its people. We all are in the same boat, and a great boat it is.

(4) Much analysis and rhetoric on this issue deals with the rights and interests of parents of school children, teachers, professional educators, judges and elected officials. All of these persons are important to our considerations. However, we must never forget that it is the welfare of the *children* which is the basis for all education, both public and private. It is thus important that we constantly remind ourselves that what we seek here is resolution of a fundamental church/state issue which will be in the best interests of the children directly involved. And in the scheduling of priorities, we should list the interests of the parents next to those of the children.

(5) The concept of religious freedom is basic to everything our nation stands for. Those who sailed on the Mayflower came to America to escape governmental restrictions on the exercise of their deeply felt religious beliefs. This religious orientation, together with the "melting pot" pluralism which developed in the nineteenth century, has resulted in a society today which respects (and indeed demands) a high degree of tolerance for differing views, be they religious or secular.

In all of this, an individual's deeply held religious convictions become particularly relevant. For example, many persons feel alienated by life in the computer age, a life which they find to be very impersonal. Frequently one's church (including church activities, such as a church

school) provides the necessary sense of community a person needs to offset this feeling of alienation in an impersonal society. Being a member of a church family can strengthen one's sense of personal dignity.

And in our hearts and minds we all must come to grips with the nuclear age. A person's sense of religion and relationship with his or her deity can be a necessary source of support and strength in finding meaning to life and in relating life to the threat of nuclear annihilation.

(6) Today there is national concern for the quality of education, both public and private, at all levels. This concern has been evidenced by the reports of President Reagan's *National Commission on Excellence in Education* and Governor Kerrey's *Nebraska Schools Task Force on Excellence in Education.* This concern results in a demand for effective means to strengthen the caliber of instruction. Doing this calls for increased teacher competence, revisions of educational curricula, improvements in school equipment, possible lengthening of school study years and many other factors which go into an educational undertaking.

(7) Today there is a national mood of distrust in large bureaucratic entities and particularly in government. With regard to education this distrust shows up in a greater desire of parents to have some meaningful control over the education of their children. Private church related schools are one means by which parents may achieve more genuine participation in the control of the education of their children.

We should understand and respect the fact that many Christian school advocates are not primarily worried about the teaching of basic skills such as reading, writing

and mathematics. They concede that their children can learn these skills in public or other private schools. Rather, they are concerned about the teaching of value systems. They view state control of schools through teacher certification and other requirements as a means of imposing the state's value system on the schools. They view this state value system as being too secular, and in direct conflict with the spiritual and religious value systems of their church ministries as applied to their schools. In a democracy these competing value systems must be allowed to co-exist and to compete. This co-existence is the real meaning of the First Amendment "free exercise of religion" clause.

(8) We should recognize that it is easy to be overly impressed with the practices and customs of our own particular domain. All of us must avoid developing a medieval trade guild mentality. We must look beyond the borders of our individual bailiwicks. We should not allow institutional loyalty to become a substitute for thought. There can be more than one way to achieve goals, and we should at least be willing to try different approaches.

(9) The supporters of Christian schools in Nebraska are genuinely religious in their orientation. They are responsible people. They feel deeply about their convictions and take their relationship with God as they understand God seriously. Clearly they are not using religion as a subterfuge to advance other goals. Contrast the integrity and religious sincerity of Nebraska Christian schools with the experiences in many southern states after the 1954 *Brown Case* United States Supreme Court decision outlawing segregation in public schools. Soon thereafter a large number of private schools, many of them church

related, were established for the primary purpose of avoiding the desegregation of education. These "segregation academies" were just that and not really for the purpose of improving education or making it more religious.

(10) The present existence and possible future extension of the number and variety of private church related schools in Nebraska is not something that Nebraska citizens should be apprehensive about. We should not fear what some might consider to be alien ideas of any group, religious or otherwise, with whom we may disagree or have little in common. In a free society we must have confidence in people ultimately to choose sound ideas. Thus, we allow various groups to compete in schools and otherwise for the allegiance of the citizenry. It is better to allow this open competition than to make martyrs out of those whose views are not welcome to the majority.

We should not build a fence around Nebraska to keep out "alien" ideas and groups. The good sense and wisdom of Nebraska citizens will continue to prevail when considering competing ideologies and institutions. Political pluralism, freedom and openness in our society remain essential.

(11) Neither the federal government nor any state, including Nebraska, should attempt to decide the correctness of any religious belief, but only whether or not such belief is sincerely held by those who profess it and is not dangerous to public safety. It is not for the Methodists to say that the Presbyterians are any more or less correct than they are themselves.

A brief analysis of constitutional law may be helpful here. The United States Constitution, especially the Bill

of Rights section, is designed to protect each of us from (a) government and (b) each other. This is why our individual constitutional rights are not absolute; they must somehow accommodate conflicting rights. For example, my First Amendment right to free speech does not allow me to libel you. Your freedom of movement does not allow you to punch me in the nose (thank goodness!). My right to operate my business freely does not allow me to discriminate against you on the basis of race or religion. The point is that these constitutional "rights" have built into them corresponding "duties". The duties require us to recognize and accommodate competing rights.

Which brings us up to the Christian school issue in Nebraska. Neither the State itself, nor any one of us, has the authority to decide the limits of First Amendment freedom of religion rights. Nor can the State in any way prefer one religion over any other.

The State does not decide what the constitution means. The constitution speaks for itself. When it is necessary to determine what the constitution is saying (which is often) it is the function of the Courts to interpret its meaning. And so, whatever "free exercise of religion" rights the Christian schools enjoy under the constitution are there as a matter of right, not by the good grace of the State or any of us.

(12) Teachers, school administrators, religious leaders and all professional educators who carry the great working burden of operating our schools warrant support. Their efforts clearly are in the public interest, and they should be praised for their genuine service. It is neither accurate nor fair to place all the blame on educators for whatever ills may not be present in our educational sys-

tem. If the bus breaks down you can't blame it all on the bus driver.

These concepts identified here are wide ranging in scope and certainly do not provide us with solutions to this issue. However, some awareness of them may be useful to us as we search for solutions.

6.

WHAT POLICY OPTIONS ARE AVAILABLE? HOW DO WE VIEW THESE OPTIONS?

What should our Nebraska public policy be? We have three choices:

(1) *Do nothing. Leave all State regulation exactly as it is now (and thus have the ultimate resolution of the issue decided by courts).*

(2) *Exempt Christian schools and children attending them from all State regulation of any kind.*

(3) *Change in some way the manner in which the State now regulates private schools (church-related, nonsectarian or both).*

In a perfect world, we would not have to choose among these three alternatives. The correct one would be easy to determine and satisfactory to all. But in our imperfect, and thereby much more interesting and challenging, world we often must make unclear and difficult choices. Although making these choices is necessary for society to function, the results can never be satisfactory to everyone. But we should not let this upset us. In a society which respects the opinions of all, it is inevitable that we frequently will have strong disagreements on pol-

icy questions. This inevitability means that we must (a) understand and respect the process of public resolution of our differences, and (b) accept the compromise settlements which any democratic and pluralistic society must have if that society is to survive. With this in mind let us look at each of these three alternatives:

(1) *Do nothing. Leave all State regulation exactly as it is now (and thus have the ultimate resolution of the issue decided by courts).*

This assumes that all present Nebraska laws, regulations and procedures with regard to church-related schools are completely proper in their present form and warrant no changes of any kind. It also assumes that all positions advanced by the supporters of Christian schools are without merit and, therefore, no adjustments are necessary to meet any of their concerns. Although this alternative has the obvious advantage of simplicity (we need not inflict upon ourselves the difficult taks of examining and modifying any of our present practices), we do not consider it a viable option. We believe that some of the concerns of Christian school supporters have validity. From this we conclude that modifications in present Nebraska procedures are both necessary and desirable.

(2) *Exempt Christian schools and children attending them from all State regulation of any kind.*

This would meet all complaints of Christian school supporters. It also would result in the State declining to accept any responsibility whatsoever for the education of children in Christian schools. In our judgment, the State clearly cannot so abdicate its responsibility for the education of a single Nebraska child. Both the constitution it-

self and sound public policy place upon the State a profound duty to assure that its youth receive effective education for citizenship. The exact limits of the constitutional right to the free exercise of religion as related to education are not clear. However, no reasonable interpretation of these limits would eliminate *all* interest of the State in the education of children in private church-related schools.

(3) *Change in some way the manner in which the State now regulates private schools (church-related, nonsectarian or both).*

Doing this represents a compromise between alternatives (1) and (2) above. It thereby suffers from the liability of not being acceptable to supporters of either alternative. It requires that supporters of both alternatives recognize some degree of validity to the position of the other. This is never easy to do, particularly when convictions are strongly held and emotions run high. In such circumstances it is extremely difficult to stand back and look anew at a situation with a significant degree of respect for strongly opposed convictions. We should heed the advice of F. Scott Fitzgerald, who said:

> "The test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function."

Difficult as all this may be, it nonetheless is our conclusion that some resolution of this Christian school issue should be sought within the parameters of this alternative number (3).

Throughout the country today there is a growing body of opinion which suggests that all states, including Nebraska, should increase, rather than decrease or leave

alone, state standards for public and private education. This body of opinion comes from present national disenchantment with many aspects of our nation's education system.

"Why can't Johnny read?" is a frequent expression which summarizes the frustrations many people feel about education today. And so perhaps the State of Nebraska ought to be seeking more, not less, regulation of schools in order to upgrade educational standards and thereby increase the quality of education of Nebraska children. If done in a thoughtful and knowledgeable manner this may be sound policy. We think it is.

Certainly any reasonable efforts to increase the effectiveness of our educational system should be encouraged. Constructive and well thought out proposals for improving education in Nebraska are contained in the outstanding September 30, 1983 report of Governor Kerrey's *Task Force on Excellence in Education in Nebraska Schools*. This perceptive report should be required reading for all Nebraska citizens. However, with specific reference to Christian schools, we believe that any strengthening of standards must be accomplished in a manner which properly takes into account (a) the religious convictions and rights of parents who chose to have their children educated in Christian schools, and (b) the children themselves.

We conclude that no one involved in this controversy has a monopoly on wisdom. There are legitimate conflicting views held by people in good faith. Nor is there any evidence that any one involved is acting in bad faith. Quite the contrary. What we have here is a dispute which has triggered intense and indeed quite heated loyal-

ties from a wide range of sincerely held convictions. Such a situation is not intrinsically wrong. It may be the inevitable result of a functioning pluralistic society where everyone is entitled to hold and to express his or her individual personal views. It is the sort of thing a free society encourages. And well that it should. The problem is simply that, in expressing these diverse views, all of us must at some point recognize that we can't have it all our own way. In every aspect of the common life there must be some sense of shared responsibility. And so *we conclude that Nebraska Christian school issue policy should be addressed on the basis of two premises:*

(1) Some modification of the present Nebraska system for regulating Christian schools is appropriate.

(2) The parents of children attending Christian schools must be willing to demonstrate to the state satisfactory educational achievement by their children.

In making the specific recommendations which follow our panel does not presume to have all, or even any, of the answers. We address the matter of resolution of this issue very humbly. We will consider our efforts worthwhile if we can help in any way to provide a thoughtful, constructive, unemotional, intelligent and wise discussion of the subject.

Reasonable people will disagree as to the exact means necessary to accommodate the conflicting interests involved. The important element is a sincere recognition that there are genuine conflicting church-state concerns here which require some accommodation.

The resolution of this controversy calls for some old-fashioned good sense, both common and horse. We hope

that some of this good sense appears in our recommendations. In any event, Nebraskans have a tradition of demonstrating concern for one another, wisdom and practical judgment. For this reason we are confident that Nebraskans will resolve this in a sensible and fair manner.

7.

WHAT SPECIFIC RECOMMENDATIONS DO WE MAKE?

1. The State clearly has an obligation to establish reasonable and effective educational standards and to exercise an appropriate degree of control over all educational efforts, both public and private. To do anything less would be an irresponsible abdication by the State of its duty to the children of today and to future generations of Nebraskans. And so the only issue here is that of defining these "reasonable and effective" standards as applied to church-related private schools.

The basic Nebraska educational goal of quality education for all children should not change. The only change needed is that certain techniques designed to accomplish this goal should be modified to accommodate legitimate (and in some instances constitutionally protected) religious liberties.

2. The First Amendment right to the "free exercise of religion", like our other constitutional rights, is not absolute. It must respect and adjust to other constitutionally protected rights. Therefore, Nebraska educational policy can and must continue to be interested in *all* education, including that which is church-related.

Church members properly can demand that this State educational policy interfere with their religious convic-

tions as little as possible. But they must recognize the legitimacy of the State's interest in the education of their children and accept *some* regulations designed to promote this State interest. In a similar manner, the State must recognize the legitimacy of sincerely held religious convictions and design its procedures so as to impinge as little as reasonably possible upon them.

3. Nebraska laws and regulations contain detailed requirements for school curriculum content, teacher certification, mandatory attendance, safety rules and related items such as physical facilities and instructional equipment and materials. For church-related private schools Nebraska policy should be modified to provide for the following exemption procedure:

(a) If all parents of children attending such a school so elect, testing of the children shall be acceptable as an alternative to curriculum, teacher certification and related item requirements for the school. The tests should be of a standardized nature. They must be nationally recognized by the State Department of Education and educators generally as proper indicators of student progress. They should be administered annually by the County Superintendents. If the average test scores in each content area and at each grade level of all students enrolled in a school are at least equal to such average test scores of students on the same or comparable tests in Nebraska public schools (or, if scores are not available for Nebraska public school students, then the nation as a whole), the school attended by these students need not meet the State curriculum, teacher certification and related items requirements.

(b) Parents who elect this alternative shall make a written representation to the State that (1) their religious beliefs dictate this choice, (2) they consent to a testing procedure for their children, and (3) they will supply regularly to the State evidence that their children are (a) meeting State mandatory attendance requirements and (b) receiving a structured program of education which satisfactorily covers all basic areas of study included in State curriculum standards and is conducted with physical facilities and instructional equipment and materials comparable to State standards. If the parents (1) fail to comply with these procedures (or their representations to the State are inaccurate), or (2) their children test below the prescribed averages, then their children will be considered to be in violation of State mandatory school attendance requirements.

(c) Health, safety and fire regulations for church-related private schools shall remain as they are.

(d) What is the result of this exemption procedure? A church-related private school, for reasons only of the religious conscience of the parents of the children attending it, may operate without seeking a license from the State or receiving any direct State approval. However, the parents of the students involved shall themselves (1) submit their children to the testing procedure, and (2) report directly to the State concerning compliance with mandatory attendance requirements and basic curriculum and related items standards.

This would seem to be a just and reasonable recognition of (1) religious and parental rights, and (2) the freedom of Christian schools to exist. At the same time, it leaves intact the basis for health and safety standards

and compulsory education. Requirements for certification of teachers and the licensing of schools could be waived, but only for specific conditions relating to religious freedom.

(e) Two principles are significant here. First, the concept of *accountability* is crucial. With this exemption procedure the *parent,* not the school, is accountable to the State. Through this parent accountability the State can fulfill its responsibility for the educational achievement of the children. Second, our view of the First Amendment free exercise of religion right as it applies here is this:

(1) The State has a "compelling interest" in the education of the Christian school children.

(2) The State's "compelling interest" must be exercised with as little interference as possible with the religious claims of the Christian schools.

(3) The State's "compelling interest" is in the actual achievement of the students, not in the means by which that achievement is obtained.

(4) When confronted by a First Amendment free exercise of religion claim it is an unconstitutional interference with religion for the State to insist on controlling the educational process (unless it can be shown that the proposed controls are essential to the desired educational achievement). Rather, the State must limit its interest to the actual achievement of students unless and until it is shown (which it has not been) that reasonable achievement cannot be obtained without State control of the process.

Some say that there must be *some* State control over teacher qualifications because there is some minimal train-

ing all teachers must have before entering a classroom. This may be so, but until it is more fully demonstrated by hard evidence, we do not think it can be constitutionally supported in this instance.

(f) Church-related private schools whose children's parents unanimously elect this exemption from curriculum and teacher certification requirements need not apply for a license from the state. They may operate without State approval.

(g) Parents who make this election for their children must acknowledge in writing that (1) because of their election they assume full responsibility for the education of their children, and (2) on behalf of themselves and their children they will not hold the State responsible for their children's education.

(h) School catalogs, public announcements and other materials which describe the school to the public and all enrollment records (such as transcripts) must show that the school is not State approved. This is a "truth in labeling" concept.

(i) Approval and accreditation requirements shall remain as they now exist for all church-related private schools whose children's parents do not unanimously elect for religious reasons only this exemption procedure. In summary, there shall be essentially two classes of church-related private schools, those which are approved and those which are not approved. Those whose children's parents so elect are simply unapproved (but may legally operate) and not a separate class of approved school.

(j) Incentives should be developed to encourage those church-related private schools (the Parochial systems, for example) which meet State requirements to continue to do so. It is not desirable that these schools opt out from the present requirements (which they meet) so as to take the same approach as unapproved schools may choose under this change. Such incentives could be items of this nature: A clear public designation as a fully approved and/or fully accredited institution; no requirement that the children attending the institution be tested; and other factors which serve this purpose.

Why do we make these suggestions?

1. The State cannot properly prefer one religion over another, discriminate among different religions, or give to any religious group a privilege not given to other religious groups. For these reasons this exemption procedure should be available across the board to all private church-related schools and not just to Christian schools.

2. The requirements that (a) parents acknowledge that they are sending their children to an unapproved school, (b) that in doing so they will not hold the State responsible for the education of their children, and (c) the suggestion that all pertinent records identify unapproved schools as such are designed for two purposes: (1) to assure that the parents are made aware of and fully understand the fact that they are sending their children to unapproved schools, and (2) to protect the State from criticism by (or indeed possible liability to) parents or children who might later claim that the State (through this exemption procedure) did not properly carry out its obligation to assure proper education for these children.

3. The reason for the student testing requirement is to meet some minimum State responsibility to the students of the unapproved schools. The principle here is that the State must be concerned with *all students*. It cannot and should not turn its back completely on the welfare of the students who are enrolled in these schools, even though there may be only a few such students and the parents of the students choose to have their children educated in a school exempt from State standards. In spite of the parents' free choice, the State must have some assurance that these students accomplish some minimum educational achievement as defined by the State.

Both the children themselves and the State obviously have an interest in educational results which make the children constructive citizens. However, we must not forget that "beauty is in the eye of the beholder." Those parents with children in Christian schools are sincerely convinced that the education their children receive is superior to that obtained in other schools. They are not in awe of State standards, and in fact have serious reservations about what they consider to be a State-imposed secular value system contained in State standards. Irrespective of constitutional considerations, we must respect our fellow citizens by remembering this paramount truth: None of us, the State included, can presume to have superior judgment as to the ultimate validity of religious beliefs or the larger goals of education beyond the learning of basic skills. The nature of a true democracy is such that there always will be fundamental differences of opinion.

Some say that any student testing procedure is defective on two counts: It is (a) simplistic and (b) invalid as an after-the-fact remedy. Let us examine these ideas:

(a) Is testing simplistic? Every major public library has a huge stack of books and professional journals dealing with the pros and cons of standardized testing. You could fill the Grand Canyon with these publications. Some experts have great confidence in the tests. Others do not. Some assert that the tests are culturally biased. Others say they can be rigged so as to be something less than objective. These criticisms may be valid in some instances. However, we think the better evidence is that standardized tests can be of some help in determining academic achievements. Any tests used in Nebraska to monitor basic skills achievements by Christian schools students can and should be examined closely by educators, legislators, parents and others. Such an examination should assure their integrity as a testing device.

(b) Is testing invalid as an after-the-fact remedy? Is the horse already out of the barn by the time the test comes around the bend? Any test is after the fact. The only question is how far after the fact. Professional schools normally test their students from four to eight months after study of the tested subjects begins. Certified public accountant and lawyer bar examinations are given several years after study of some of the skills tested. We suggest that annual student testing is both frequent and soon enough for student achievement to be determined on a reasonably current basis. Unsatisfactory progress by a student would be determined within a year. This should be soon enough to alert parents and education authorities to any special needs of the student.

4. Some accommodation to the First Amendment freedom of religion claims of the Christian school supporters must be recognized. The State's *in loco parentis*

rights with reference to the education of children are in conflict with the First Amendment free exercise of religion rights of Christian schools and the parents who wish to enroll their children in these schools.

When a conflict of this nature occurs the State *in loco parentis* rights must give way to some extent to the First Amendment free exercise of religion rights. We suggest that this exemption procedure properly accomplishes this, but does so in a sufficiently limited manner so as to avoid either (a) any general weakening of Nebraska education standards or (b) complete elimination of the State's obligation to Christian school students. In summary, this proposal carves out a special constitutionally protected niche for the Christian schools. It does not create a situation which would encourage Parochial and other private schools to lessen in any way their commitment to meeting present State requirements. We are not "mainstreaming" an exemption procedure by making it attractive to all church-related private schools.

5. We considered the testing of teachers in lieu of certification. This may bear study. However, we do not consider it as effective a device to meet the freedom of religion issue as is the testing of students. It would be difficult to design teacher tests which would enjoy the same public acceptance as do standardized student tests. And this difficulty could result in these teacher tests being constitutionally suspect as an unreasonable interference with free exercise of religion rights. In this sense, teacher tests have some similarity to the certification process and thus raise the control of religion question with regard to Christian schools. Although the testing of students is not an ideal procedure, we conclude that

it is (a) better than no check at all on the students, and (b) as a practical matter the most workable procedure with reference to the constitutional free exercise of religion concerns.

6. The practical result of these recommendations as they relate to the Christian school supporters is this: They may choose for religious reasons to have their children educated in schools unapproved by the State. However, when doing so they themselves, not the State, must be responsible for their decisions. Many of them want and are anxious to accept this responsibility.

7. There should be no weakening of the State's interest in equal educational opportunities for all in keeping with constitutional and moral principles. The exemption procedure described here should not be allowed to be used in any manner which would result in student admissions or study practices which have the effect of discriminating on the basis of race, color, religion, national origin or sex.

8. The procedures we suggest (or any other arrangements which might be adopted in their place) cannot guarantee success. They may not work out. However, we respectfully suggest that they be given a try. They should be watched closely. If evidence later shows them to be invalid then the whole matter should be reconsidered. Other arrangements can then be adopted. Nothing here is carved in stone.

9. Our task has been to address the Christian school issue, and this we have done. However, there are two related areas of concern which deserve attention also. These are the special concerns of Amish people for their educational principles and the growing home school move-

ment in Nebraska and elsewhere. Although these two groups are beyond the scope of our study, we suggest that they properly deserve attention along with Christian schools. We are of the opinion that the testing and related procedures we suggest here for Christian school advocates also could be designed and applied to meet the religious freedom and policy convictions of the Amish and home school advocates.

10. Although a prompt resolution of the present controversy is to be sought, our report can be nothing more than a part of the process toward resolution. These issues warrant an effective continuing dialogue. To assist in achieving this we recommend that the Governor appoint an advisory panel to study church-state educational matters for at least the next two years (or until these issues appear to have been resolved in a reasonable manner). This panel should conduct an ongoing discussion with church leaders, professional educators, State Board of Education representatives, parents of school children, legislators, School Board members and others. It should make specific recommendations to the Governor, the legislature and Nebraska citizens on educational issues relating to the State's interest in educational excellence and religious freedom.

8.

WHAT GENERAL RECOMMENDATIONS DO WE MAKE?

1. Let us face this Christian School issue directly, clearly and without hedging in any way. Only if we tackle it head-on can we resolve it. Efforts to ignore, pass over

or "get around" the concerns presented will only prolong and make worse an already difficult situation.

2. No one ever really wins a fight. We can't resolve this issue as long as any of us involved are separated by a wall of quiet (or, worse yet, noisy) hostility and overt suspicion. In our discussions we need to lower the decibel level.

The Biblical commandment to "Love Thy Neighbor" must mean something. We need a degree of harmony, which requires tolerance even if understanding is sometimes lacking.

We must confront issues, not personalities. The key to any constructive resolution of this controversy will be our ability to make judgments solely on the basis of the issues.

3. *We should be very clear about these things:*

a. Nebraska is blessed with high caliber teacher training institutions, teachers and school aministrators. Our State also is fortunate to have a State Department of Education of the highest order under the direction of an outstanding State Board of Education. The Department's professional staff is competent, diligent and sensitive to social issues. Most important of all, it *cares* about Nebraska school children.

b. There are many excellent church-related private schools in our State. These schools readily meet all State standards and frequently exceed them. They are to be commended for their high educational quality. We cite as examples the five church-related private school systems operated by the Kansas-Nebraska Conference of

Seventh-day Adventists, the Nebraska District Lutheran Church-Missouri Synod, the Catholic Archdiocese of Omaha and the Catholic Dioceses of Lincoln and Grand Island. In our study we also observed examples of quality in Christian schools.

c. We should understand that some elements of education are not measurable by readily ascertainable techniques. Testing, awards and the like do not tell the whole story. For example, all we need to know about prizes is that Mozart never won one.

d. Some suggest that this controversy may be resolved by the simple expedient of not enforcing the law; that is, since there are so few Christian schools involved and a small number of children attending them, just look the other way. We find this solution untenable. Laws should be both enforced and obeyed. If laws are unfair (or unconstitutional) they can and should be changed through legitimate legislative or judicial action. Simply ignoring noncompliance corrupts the very concept of government by law.

e. The proper way to resolve this controversy is through normal legislative channels, rather than through reliance on court proceedings. The judicial process tidies up and organizes; it neither solves nor explains.

4. Nebraska has sound educational standards of which it should be proud. Our State need not and should not compromise these standards in order to meet the requirements of religious freedom or for any other reason. First Amendment freedom of religion guarantees and proper policy recognition of religious convictions do not require compromising the State's basic system of edu-

cational standards. And whatever these standards may be, they should not feel threatened by educational procedures of Christian schools (which, after all, can and do set legitimate standards of their own). Rather, all that is required is some limited substitute procedure (such as we suggest) to accommodate the genuine religious convictions of some of our fellow Nebraska citizens.

Our confidence in state standards should not prejudice our view of Christian and other church-related private schools who respond "to the beat of a different drummer." These other schools can provide quality education for their students. In our democratic society we ought to be willing to let the educational market place influence the viability of schools. Over the long run people will not support inferior schools, public or private.

9.

CONCLUSION

This issue has been before our state for too long. It is manageable and does not warrant an endless debate. It can and should be resolved now. Or sooner. Rome was not built in a day, but that was because there were no Nebraskans on the job.

We have attempted to approach this in an open-minded fashion. Aristotle would not have qualified to teach philosophy in Nebraska schools. On the other hand, when Aristotle was contemplating the universe there was no state-controlled system of universal education (with the result that the illiteracy rate was appallingly high). And so it goes. We have tried to consider carefully all issues and points of view without prejudging anything.

Irrespective of how this report may be evaluated, we strongly suggest that this Christian school controversy should not be viewed as a problem. Rather, it is an *opportunity* for Nebraskans to think carefully about the important concepts of education and religious liberty. By doing so we should be able to stake out some common ground upon which to resolve this.

What is this common ground? We suggest that most of us would recognize that (a) the State has an obligation to determine and enforce reasonable educational achievement standards for students of private as well as public schools, and (b) there is legitimacy to the religious freedom claim that some present State regulations are unnecessarily restrictive when applied to Christian schools. We can get off dead center by agreeing that the proper accommodation of these two sometimes conflicting concepts may require limited changes in State policy. What these exact changes should be is something which can be debated calmly (and about which there can be reasonable differences of opinion). We have proposed some specific changes in the hope that from our ideas and the thoughts of others some viable resolution will emerge.

Perhaps this challenge tests the genuiness of our tolerance of, and respect for, differing beliefs. We sometimes think everyone should be in our own image. We want others to be clones of ourselves. And yet it is the diversity of American life, including the very pluralism evidenced by widely different religions, which gives our society its vitality and indeed its substance. Pluralism keeps us from being bored with one another. What would American music be without the variety provided by a Count Basie, an Itzhak Perlman and a Catherine Crozier?

The people of Nebraska are citizens in the classical Greek sense: concerned with all aspects of the welfare of the State; responsible but penetrating critics aiding in every effort to make "the good life" possible for all people. Viewed in this context, prompt settlement of this issue is certainly possible, perhaps even likely.

No person should be asked to compromise his or her sincerely felt religious beliefs. Nor should the State be asked to back away from its responsibility for an education system which will produce highly knowledgeable students. This report is an effort to demonstrate that there are reasonable means by which an accommodation of these sometimes conflicting interests can be achieved without damage to either.

A fair and reasonable resolution of this controversy is more than just a matter of education and religion. It all comes down to a word which is the cornerstone of our society. Justice.

APPENDIX A

NEBRASKA EDUCATION FACTS

What is the elementary and secondary school population in Nebraska? Nebraska Department of Education figures show that there are a total of 305,858 Nebraska students distributed among schools as follows:

(a) In approved public schools: 269,103

(b) In approved private schools: 36,478

(c) In unapproved private schools: 227

There are approximately 400 public school districts having both secondary and elementary schools and slightly under 700 districts with elementary schools only. Most of the state's 264 private schools are church-related. Of these 264 schools 250 are state approved and 14 are unapproved. The Christian schools now at issue in Nebraska are among the 14 unapproved schools.

APPENDIX B

PANEL MEMBERS

1. Mrs. Sally Knudsen
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2. Mr. Alcurtis Robinson
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4. Mr. Robert M. Spire
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   Omaha, Nebraska 68102
   Chair

APPENDIX C

PANEL PROCEDURES

The panel conducted its study through:

1. A large number of personal visits and conversations with people interested in and involved in this issue, such as:

(a) Nebraska State Department of Education staff members and present and former members of the Nebraska State Board of Education;

(b) Ministers who actually operate Christian Schools;

(c) many individuals who are interested in the issue and whose views differ widely, including a number of ministers of Christian churches who do not themselves operate schools but are interested in the operation of them;

(d) professional educators, including teachers, Nebraska State Education Association representatives, college and university teacher training personnel, university professors and educational administrators;

(e) clergymen and others interested in and involved in the operation of Parochial and other church-related school systems in the State of Nebraska;

(f) parents of children in both public and private schools; and

(g) Nebraska citizens generally; we made a point of visiting about this issue with almost everyone with whom we came in contact personally.

2. Visits to Christian schools.

3. A series of lengthy panel meetings plus much communication among ourselves by telephone, letter and personal conferences.

4. A great deal of time in personal study and reflection. We all were waking up in the middle of the night thinking about this.

APPENDIX D

PANEL REFERENCE SOURCES

The panel studied and discussed a great many materials dealing with (a) the history of the Christian school issue in Nebraska and the country; (b) State laws, regulations and procedures governing education in Nebraska and elsewhere; (c) the basic concepts involved in defining appropriate church-state relationships with regard to matters of an educational and religious nature.

Many of these materials were supplied to us by the State of Nebraska Policy Research Office, the State Department of Education, supporters of Christian schools, representatives of the Nebraska Christian Home School Association and members of the Legislature. In addition, the panel itself collected and reviewed a variety of references, including:

a. News articles, editorials and book reviews from many newspapers (especially the *New York Times;* the *Christian Science Monitor;* the *Wall Street Journal*; the *Washington Post;* the *Omaha Star*; the *Omaha World-Herald;* the *Lincoln Star;* and the *Lincoln Journal*).

b. Critiques from magazines and professional journals (including the *Nebraska Law Review; The Nebraska*

Humanist, published by the Nebraska Committee for the Humanities; the *Black Scholar; Social Work,* the Journal of the National Association of Social Workers; and the *Harvard Educational Review*).

c. Books (*Human Values in a Secular World,* Robert Apstol, editor; *The New King James New Testament,* Special Crusade Edition printed for the Billy Graham Evangelistic Association, Thomas Nelson Inc., Publishers; *The Troubled Crusade: American Education, 1945-1980,* Diane Ravitz, author; *Beyond the Ivory Tower,* Derek Bok, author; and many others).

d. Federal and state court decisions.

e. Written analyses prepared by panel members themselves for study by and comment from other panel members.

Although we obviously could not read everything on the subject, we tried to do our homework. We sometimes felt as if we had joined a Book-of-the-Day Club.

APPENDIX H

LEGISLATURE OF NEBRASKA
EIGHTY-EIGHTH LEGISLATURE
SECOND SESSION
LEGISLATIVE BILL 928
FINAL READING

Introduced by Education Committee, Vickers, 38, Chairperson; Harris, 27; Hoagland, 6; Newell, 13; Goll, 16; Scofield, 49; Eret, 32; H. Peterson, 35; DeCamp, 40

Read first time January 9, 1984
Committee: Education

A BILL

FOR AN ACT relating to schools; to amend sections 79-201, 79-328, and 79-1701, Reissue Revised Statutes of Nebraska, 1943; to change provisions relating to required attendance; to change powers and duties of the State Board of Education; to provide for an election relating to accreditation and approval requirements; to provide alternative requirements as prescribed; to provide penalties; to prohibit certain actions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 79-201, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

79-201. Every person residing in a school district within the State of Nebraska who has legal or actual charge or control of any child, not less than seven nor more than sixteen years of age, shall cause such child to

attend regularly the public, private, denominational, or parochial day schools *which have met the requirements for legal operation prescribed in Chapter 79* each day that such schools are open and in session except when excused by school authorities, unless such child has been graduated from high school. The term shall not be less than one hundred seventy-five days in any district, except that in the event of the failure of any district which receives twenty per cent or more of its total receipts for general fund purposes from federal sources to actually receive receipts anticipated at the time of the adoption of the school budget from taxes, state funds, federal funds, tuition, or other sources, the board of education of such district may, at any time during the school year, elect to close all or part of its schools.

Sec. 2. That section 79-328, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

79-328. The State Board of Education shall have the power and it shall be its duty:

(1) To appoint and fix the compensation of the Commissioner of Education;

(2) To remove the commissioner from office at any time for conviction of any crime involving moral turpitude or felonious act, for inefficiency, or for willful and continuous disregard of his or her duties as commissioner or of the directives of the board;

(3) Upon recommendation of the commissioner, to appoint and fix the compensation of a deputy commissioner and all professional employees of the board;

(4) To organize the State Department of Education into such divisions, branches, or sections as may be neces-

sary or desirable to perform all its proper functions and to render maximum service to the board and to the state school system;

(5) To provide, through the commissioner and his or her professional staff, enlightened professional leadership, guidance, and supervision of the state school system. *In . . .* order that the commissioner and his or her staff may carry out their duties, the board shall, through the commissioner:—(a) *Provide* supervisory and consultative services to the schools of the state;—(b) issue materials helpful in the development, maintenance, and improvement of educational facilities and programs;—(c) establish rules and regulations *which govern standards and procedures for the legal operation of all public, private, denominational, or parochial schools in the state. All public, private, denominational, or parochial schools shall either comply with the accreditation or approval requirements prescribed in this section and section 79-1247.02 or, for those schools which elect not to meet accreditation or approval requirements, the requirements prescribed in this section and subsections (2) to (4) of section 79-1701. Such accreditation and approval standards and procedure may be* based upon the program of studies, guidance services, the number and preparation of teachers in relation to the curriculum and enrollment, instructional materials and equipment, science facilities and equipment, library facilities and materials, *and* health and safety factors in buildings and grounds. *Rules and regulations which govern procedures and standards for private, denominational, and parochial schools which elect pursuant to the procedures prescribed in subsections (2) to (4) of section 79-1701, not to meet state accreditation or approval*

requirements shall be based upon evidence that such schools offer a program of instruction leading to the acquisition of basic skills in the language arts, mathematics, science, social studies, and health. Such rules and regulations may include a provision for the visitation of such schools and regular achievement testing of students attending such schools in order to insure that such schools are offering instruction in the basic skills listed in this subdivision. Any arrangements for visitation or testing shall be made through a parent representative of each such school. The results of such testing may be used as evidence that such schools are offering instruction in such basic skills, but shall not be used to measure, compare, or evaluate the competency of students at such schools; (d) establish rules and regulations—and procedures for classifying, approving, and accrediting schools, for approving the opening of new schedules, for the continued legal operation of all schools, and for the approval of high schools for the collection of nonresident high school tuition money in accordance with the rules and regulations provided for in this subdivision, except that the State Board of Education shall approve a school for the collection of nonresident high school tuition money when a hardship would result to the students and a substantial effort is being made to comply with the rules and regulations established; *(e)* institute a statewide system of testing to determine the degree of achievement and accomplishment of all the students within the state's school systems, if it determines such testing would be advisable; *(f)* prescribe a uniform system of records and accounting for keeping adequate educational and financial records, for gathering and reporting necessary educational data, and for evaluating educational progress; *(g)* cause to be published laws

and regulations governing the schools and the school lands and funds, with explanatory notes for the guidance of those charged with the administration of the schools of the state; *(h)* approve teacher education programs conducted in Nebraska institutions of higher education designed for the purpose of certificating of teachers; and *(i)* approve general plans and adopt educational policies, standards, rules, and regulations for carrying out the board's responsibilities and those assigned the State Department of Education by the Legislature;

(6) To submit a biennial report to the Governor and the Clerk of the Legislature covering the actions of the board, the operations of the State Department of Education, and the progress and needs of the schools, and to recommend such legislation as may be necessary to satisfy these needs;

(7) To cause to be prepared and distributed reports designed to acquaint school district officers, teachers, and patrons of the schools with the conditions and needs of the schools;

(8) To provide for consultation with professional educators and lay leaders for the purpose of securing advice deemed necessary in the formulation of policies and in the effectual discharge of its duties;

(9) To cause such studies, investigations, and reports to be made and such information assembled as are necessary for the formulation of policies, for making plans, for evaluating the state school program, and for the making of essential and adequate reports;

(10) To submit to the Governor and the Legislature a budget necessary to finance the state school program,

under its jurisdiction, including the internal operation and maintenance of the State Department of Education;

(11) To interpret its own policies, standards, rules, and regulations and, upon reasonable request, hear complaints and disputes arising therefrom;

(12) With the advice of the Department of Motor Vehicles, to adopt reasonable standards, not inconsistent with existing statutes, governing: (a) The general design, equipment, color, operation, and maintenance of any vehicle with a manufacturer's rated seating capacity of eleven or more passengers used for the transportation of school children; and (b) the equipment, operation, and maintenance of any vehicle with a capacity of ten or less passengers used for the transportation of school children, when such vehicles are either owned or operated, or owned and operated, by any school district, or privately owned or operated under contract with any school district in this state. Similar standards are to be adopted for operators of such vehicles as to physical and mental qualitities, driving skills and practices, and knowledge of traffic laws and regulations which relate to school bus transportation. Such rules and regulations shall by reference be made a part of any such contract with a school district. Any officer or employee of any school district who violates any of the regulations or fails to include obligations to comply with the regulations in any contract executed by him or her on behalf of a school district shall be guilty of a misdemeanor and shall, upon conviction thereof, be subject to removal from office or employment. Any person operating a school bus under contract with a school district who fails to comply with any of such regulations shall be guilty of breach of contract and such contract shall be

canceled after notice and hearing by the responsible officers of such school district;

(13) To accept, on behalf of the Nebraska School for the Visually Handicapped, on behalf of the Nebraska School for the Deaf, or on behalf of any school for mentally retarded children which is exclusively owned by the State of Nebraska and under the control and supervision of the State Department of Education, devises of real property or donations or bequests of other property, or both, if in its judgment any such devise, donation, or bequest is for the best interest of any such school or the students attending thereat, or both, and may cause any such real estate to be irrigated or otherwise improved when, in its judgment, it would be advisable to do so; and

(14) Upon acceptance of any devise, donation, or bequest as provided in this section, to administer and carry out such devise or bequest in accordance with the terms and conditions thereof. If not prohibited by the terms and conditions of any such devise, donation, or bequest, it may sell, convey, exchange, or lease property so devised, donated, or bequeathed upon such terms and conditions as it deems best and deposit all money derived from any such sale or lease in the State Department of Eucation Trust Fund.

Each member of the Legislature shall receive a copy of the report required by subdivision (6) of this section by making a request for it to the commissioner.

None of the duties prescribed in this section shall provent the board from exercising such other duties as in its judgment may be necessary for the proper and legal exercise of its obligations.

Sec. 3 That section 79-1701, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

79-1701. (1) All private, denominational, and parochial schools in the State of Nebraska, and all teachers employed or giving instruction therein, shall be subject to and governed by the provisions of the general school laws of the state so far as the same apply to grades, qualifications, and certification of teachers and promotion of pupils. All private, denominational, and parochial schools shall have adequate equipment and supplies, and shall be graded the same and shall have courses of study for each grade conducted therein, substantially the same as those given in the public schools where the children attending would attend in the absence of such private, denominational, or parochial schools.

(2) The provisions of subsections (2) to (4) of this section shall apply to any private, denominational, or parochial school in the State of Nebraska which elects not to meet state accreditation or approval requirements. Elections pursuant to such subsections shall be effective when a statement is received by the Commissioner of Education signed by the parents or legal guardians of all children attending such private, denominational, or parochial school stating that (a) the requirements for approval and accreditation required by law and the rules and regulations adopted and promulgated by the State Board of Education violate sincerely held religious beliefs of the parents or legal guardians, (b) an authorized representative of such parents or legal guardians will at least annually submit to the Commissioner of Education the information necessary to prove that the requirements of subdivisions (i) to (iii) of this subsection are satisfied,

(c) the school offers the courses of instruction required by this subsection and section 79-328, and (d) the parents or legal guardians have satisfied themselves that individuals monitoring instruction at such school are qualified to monitor instruction in the basic skills as required by this subsection and section 79-328 and that such individuals have demonstrated an alternative competency to monitor instruction or supervise children pursuant to subsections (2) to (4) of this section. Each such school shall (i) meet minimum requirements relating to health, fire, and safety standards prescribed by state law and the rules and regulations of the State Fire Marshal, (ii) report attendance pursuant to section 79-201, and (iii) maintain a sequential program of instruction designed to lead to basic skills in the language arts, mathematics, science, social studies, and health. The State Board of Education shall establish procedures for receiving information and reports required by subsections (2) to (4) of this section from authorized parent representatives who may act as agents for parents or legal guardians of students attending such school and for individuals monitoring instruction in the basic skills required by this subsection.

(3) Individuals employed by schools which elect not to meet state accreditation or approval requirements shall not be required to meet the certification requirements prescribed in Chapter 79, article 12, but shall either (a) take appropriate subject matter components of a nationally recognized teacher competency examination designated by the State Board of Education as (i) including the appropriate subject matter areas for purposes of satisfying the requirements of subsection (2) of this section and (ii) a nationally recognized examination or (b)

offer evidence of competence to provide instruction in the basic skills required by subsection (2) of this section pursuant to informal methods of evaluation which shall be developed by the State Board of Education. Such evidence may include educational transcripts, diplomas, and other information regarding the formal educational background of such individuals. Information concerning test results, transcripts, diplomas, and other evidence of formal education may be transmitted to the State Department of Education by authorized representatives of parents or legal guardians. The results of such testing or alternative evaluation of individuals who monitor the instruction of students attending such schools may be used as evidence of whether or not such schools are offering adequate instruction in the basic skills prescribed in subsection (2) of this section and in section 79-328, but shall not be used to prohibit any such school from employing such individuals. Failure of a monitor, who is tested for the purpose of satisfying in whole or in part the requirements of subsections (2) to (4) of this section, to attain a score equal to or exceeding both the state or national average score or rating on appropriate subject matter components of recognized teacher competency examinations designated by the State Board of Education may be by itself sufficient proof that such school does not offer adequate instruction in the basic skills prescribed in subsection (2) of this section.

(4) The demonstration of competencey to monitor instruction in a private, denominational, or parochial school which has elected not to meet state accreditation or approval requirements shall in no way constitute or be construed to grant a license, permit, or certificate to teach

in the State of Nebraska. Any school which elects not to meet state accreditation or approval requirements and does not meet the requirements of subsections (2) to (4) of this section shall not be deemed a school for purposes of section 79-201 and the parents or legal guardians of any children attending such school shall be subject to prosecution pursuant to section 79-201 or any statutes relating to habitual truancy.

Sec. 4. *Any person who, as an authorized representative of a parent or legal guardian, transmits information required by subsections (2) to (4) of section 79-1701 knowing such information to be false shall be guilty of a ClassIIIA misdemeanor.*

Any person who knowingly gives false information to an authorized representative of a parent or legal guardian, knowing that such information is intended to be transmitted to the State Board of Education, shall be guilty of a ClassIIIA misdemeanor.

Sec. 5. *No publicly funded college or university in this state shall prohibit the admission of any child educated in any school which elects to meet the requirements of subsection (2) to (4) of section 79-1701 if the child is qualified for admission as shown by testing results.*

Sec. 6. That original sections 79-201, 79-328, and 79-1701, Reissue Revised Statutes of Nebraska, 1943, are repealed.

Office-Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1974

In The

Supreme Court of the United States

October Term, 1984

NORTH PLATTE BAPTIST CHURCH of North Platte, Nebraska, A Corporation; North Platte Christian School, North Platte, Nebraska; and Robert D. Gelsthorpe,

Petitioners,

v.

STATE OF NEBRASKA

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A PARTY SEEKING TO RECOVER UPON A CLAIM MAY AT ANY TIME AFTER THE FILING OR ANSWER OR AFTER SERVICE OF A MOTION FOR SUMMARY JUDGMENT BY THE ADVERSE PARTY, MOVE WITH OR WITHOUT SUPPORTING AFFIDAVITS FOR A SUMMARY JUDGMENT IN HIS FAVOR.

II.

WHETHER THE JUDGMENT SOUGHT BE RENDERED FORTHWITH IF THE PLEADINGS, DEPOSITIONS AND ADMISSIONS OF FILE, TOGETHER WITH THE AFFIDAVITS, IF ANY, SHOW THAT THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THAT THE MOVING PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

III.

WHETHER A SUMMARY JUDGMENT IS A PROPER DEVICE TO DISPOSE OF A CONSTITUTIONAL CHALLENGE.

IV.

WHETHER A STATE HAS THE POWER TO PASS REASONABLE REGULATIONS INVOLVING EDUCATION.

V.

WHETHER A COURT OF EQUITY MAY PROPERLY AFFORD INJUNCTIVE RELIEF WHEN

THERE HAS BEEN A CONTINUING AND FLAGRANT COURSE OF THE LAW.

VI.

WHETHER THE CASE AT BAR IS MOOT.

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No. 83-1974

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NORTH PLATTE BAPTIST CHURCH of North Platte, Nebraska, A Corporation; North Platte Christian School, North Platte, Nebraska; and Robert D. Gelsthorpe,

Petitioners,

v.

STATE OF NEBRASKA

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

STATEMENT OF THE CASE

The State of Nebraska ex rel. Lincoln County Attorney, (hereinafter, "plaintiff"), brought this action in the District Court of Lincoln County, Nebraska (hereinafter, "district court"), against the North Platte Baptist Church, North Platte Christian School and Robert D. Gelsthorpe (hereinafter, collectively, "defendants") seek-

ing a permanent injunction to prohibit the defendants from educating compulsory-aged school children in violation of eight separate state education laws and regulations. A copy of the petition is included herein as Appendix "A". The defendants admitted out-right five of the violations in their answer and admitted the material facts alleged in the other three violations but claimed they were not subject thereto because of alleged First and Fourteenth Amendment rights under the United States Constitution and their rights under Article I, Section 3, of the Nebraska Constitution. A copy of the defendants' answer is included herein as Appendix "B". The district court granted the plaintiff's motion for summary judgment and granted injunctive relief. The defendants appealed. The Nebraska Supreme Court affirmed in an opinion reported as *State ex rel. Kandt v. North Platte Baptist Church*, 216 Neb. 684, 345 N.W.2d 19 (1984).

———o———

STATEMENT OF FACTS

The North Platte Baptist Church of North Platte, Nebraska, has been operating the North Platte Christian School (Answer:2) since January, 1979 (Answer:3). The school offers services for children in grades kindergarten through twelfth (Answer:2). The Church employs Robert D. Gelsthorpe (hereinafter, "Gelsthorpe") as Superintendent of the School (Answer:2). He is employed to supervise and guide the children in the school (Affidavit: Gelsthorpe). Gelsthorpe does not hold, nor has he applied for an Administrative and Supervisory Certificate or a Teachers Certificate (Answer:15). Certification is re-

quired by Neb.Rev.Stat. §§ 79-1701 and 79-1233 (Reissue 1981) (Answer:15,16). Neb.Rev.Stat. § 79-1701 (Reissue 1981) provides that all private, denominational, and parochial schools in the State of Nebraska, and all teachers employed or giving instruction therein, shall be subject to and governed by the provisions of the general school laws of the state so far as the same apply to grades, qualifications, and certification of teachers and promotion of pupils.

Neb.Rev.Stat. § 79-207 (Reissue 1981) requires each teacher to send a list of pupils enrolled and certain information regarding the pupils to the county superintendent. The petitioners admitted that they failed to file such reports (Answer:4a). Additionally, the petitioners failed to file with the Nebraska Department of Education transcripts of college credits earned by each teacher (Answer: 4f), as required by Rule 14 of the Nebraska Department of Education.

ARGUMENT

I.

The order of the District Court granting the plaintiff-appellee's motion for summary judgment should be affirmed.

A party seeking to recover in district court upon a claim may, at any time after the filing of answer or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor. Neb.Rev.Stat. § 25-1330

(Reissue 1979). The judgment sought shall be rendered forthwith if the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Neb.Rev.Stat. § 25-1332 (Reissue 1979); *Mutual Benefit Life Insurance Company of New Jersey v. Chisholm,* 213 Neb. 301, 329 N.W.2d 103 (1983); *Stolte v. Blackstone,* 213 Neb. 113, 328 N.W.2d 462 (1982); *Manzer v. Pentico,* 209 Neb. 364, 307 N.W.2d 812 (1981).

The pleadings and affidavits on file in the case at bar show that there are no genuine issues as to any material facts and that the plaintiff is entitled to a judgment as a matter of law. Where, as here, the allegations and admissions contained in the pleadings and the evidence offered at the hearing on the motion for summary judgment show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law, the motion should be sustained and summary judgment should be granted. *McGreevy v. Bremers,* 205 Neb. 554, 288 N.W.2d 491 (1980). A fortiori, the order of the district court granting the plaintiff's motion for summary judgment was properly affirmed by the Nebraska Supreme Court.

A. The pleadings and affidavits on file show that that there is no genuine issue as to any material fact.

Upon a motion for summary judgment, the court must examine the evidence, not to decide any issue of fact, but to determine whether any real issue of fact exists. *Bender v. James,* 212 Neb. 77, 321 N.W.2d 436 (1982); *Wilke v. Holdrege Coop Equity Exchange,* 200 Neb. 803, 265 N.W.2d

672 (1978); *Hubbell v. Farmers Insurance Group,* 200 Neb. 472, 263 N.W.2d 863 (1978); *Mecham v. Colby,* 156 Neb. 386, 56 N.W.2d 299 (1953). Summary judgment should be granted to the movant unless the opposing party offers competent evidence that there is a genuine issue as to a material fact. Defendants have offered no evidence that a material fact is at issue in this matter. To the contrary, the defendants admit all of the material facts in the pleadings and affidavits which they filed.

In paragraph 2 of their answer, the defendants admit that North Platte Christian School is a school operated by North Platte Baptist Church which provides educational services for children in grades kindergarten through twelfth. Plaintiff asserts in paragraph 3 of its petition that North Platte Christian School opened in January, 1979, has continuously operated since that time, and will continue to operate unless restrained and enjoined. In paragraph 4 of their answer, the defendants admit the aforementioned assertions contained in paragraph 3 of the petition.

Paragraph 4a of the petition alleges that the North Platte Christian School is being operated in violation of the school laws of the State of Nebraska by failing to make reports as required by Neb.Rev.Stat. § 79-207. In paragraph 4a of their answer, the defendants admitted the allegations contained in paragraph 4a of the petition.

Plaintiff alleges in paragraph 4e of the petition that the North Platte Christian School is operating in violation of Nebraska's school laws by failing to render a Fall Approval Report to the State Department of Education of the State of Nebraska as required by Rule 14-5(a) (i) of the rules and regulations of the State Department of Edu-

cation. In paragraph 4e of their answer, the defendants admit the allegations contained in paragraph 4e of the petition.

Plaintiff additionally alleges in paragraph 4f of the petition that North Platte Christian School is operating in violation of the school laws of Nebraska by failing to file with the State Department of Education a complete transcript of all credits earned by any teacher in that school as required by Rule 14-41 of the rules and regulations of the State Department of Education. The defendants admit the allegations contained in paragraph 4f of the petition as stated in paragraph 4f of their answer.

Plaintiff further alleges in paragraph 4g of the petition that North Platte Christian School is operating in violation of the school laws of the State of Nebraska by failing to seek initial approval status as an approved school system as required by Rule 14-(2) of the rules and regulations of the State Department of Education. Defendants admit such allegations in paragraph 4g of their answer. *As the defendants have admitted violations of the rules and regulations of the State Department of Education, their argument that such rules must be introduced into evidence is without merit.*

By admitting the allegations contained in paragraphs 2, 3, 4a, 4e, 4f, and 4g of the petition, the defendants have not brought into fruition any genuine issues of material fact. Further, the denials advanced in the defendants' answer do not raise any genuine issues of material fact.

In the affidavit of Robert D. Gelsthorpe received into evidence as Exhibit 4, defendant Gelsthorpe admits that his "religious convictions are such that it would be impossible for [him] to abide by the Nebraska School Laws

and Rules 14 and 21." (Paragraph 8.) In paragraph 9 of his affidavit Gelsthorpe acknowledges that the extent of his constitutional rights is at issue. Statements identical to paragraphs 8 and 9 of Gelsthorpes' affidavit appear in the affidavit of Dean and Jeanne Barney (Exhibit 5). The affidavits of Gelsthorpe and the Barneys certainly do not raise genuine issues of material fact, and if anything, show that the fundamental substantive issues involved focus upon the interpretation of the constitutional rights of the defendants. Such issues would pose questions not of fact, but of law.

As stated above, it is well established that upon a motion for summary judgment that the court must examine the evidence not to decide any issue of fact, but to determine whether any real issue of fact exists. The pleadings and affidavits involved in this matter do not demonstrate that there are any genuine issues of material fact involved. Therefore, the district court properly granted the plaintiff's motion for summary judgment because there are no genuine issues of material fact involved in this matter.

B. The State of Nebraska was entitled to judgment as a matter of law.

As was previously demonstrated *(see,* Section A), an examination of the record in this case demonstrates that there are no issues of material fact. Only issues of law have been presented. Further, the raising of constitutional defenses does not and of itself raise factual issues which must be resolved fully at trial. *Larson v. Board of Regents,* 189 Neb. 688, 204 N.W.2d 568 (1973). Summary

judgment is a proper device to dispose of a constitutional challenge. *D'Amico v. Board of Medical Examiners,* 112 Cal.Rptr. 786, 520 P.2d 10 (1974); *Blades v. City of Raleigh,* 280 N.C. 531, 187 S.E.2d 35 (1972). As no factual issues are raised by the defendants and only legal issues are presented to the court as constitutional defenses, judgment can indeed be rendered as a matter of law. And as will be demonstrated shortly, judgment as a matter of law was correctly rendered for the plaintiff.

Defendants cannot seriously contend that the Constitution of the United States denies the several states the power to pass reasonable regulations involving schools. Indeed, an ample line of precedent from the United States Supreme Court has established that the states do have the power to reasonably regulate schools, both public and non-public. *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Lemon v. Kurtzman,* 403 U.S. 602 (1971). As the Court stated in *Runyon v. McCrary,* 427 U.S. 160 (1976).

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. [Citations and footnote omitted.] Indeed, the Court in Pierce expressly acknowledged "the power of the State reasonable to regulate all schools, to inspect, supervise and examine them, their teachers and pupils. . . ." 268 US, at 534, . . .

Id. at 178-79.

The principles enunciated by the United States Supreme Court have been expressly adopted by the courts of Nebraska. *State ex rel. Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571, *appeal dismissed,* 454 U.S. 803 (1981). Despite this authority, defendants argue that *Faith Baptist* was somehow limited to its facts or the parties involved. However, to so argue is to completely ignore relevant decisions of the Nebraska Supreme Court. For example, in *Sileven v. Tesch,* 212 Neb. 880, 326 N.W.2d 850 (1982), the court stated:

> After announcing that we were considering Sileven's contention that his first and ninth amendment rights were violated, our opinion in *Faith Baptist* found that his first and ninth amendment rights were not being violated. That issue, insofar as it affects Sileven and the Faith Baptist Church, is no longer an open question in this jurisdiction, *and our decision in Faith Baptist has declared the law in this jurisdiction, no matter what anyone may argue to the contrary.* Our decision is final and binding. We have already found that Sileven and the Faith Baptist Church do not have a first amendment right to ignore the state's school laws. It is Sileven's choice to continue violating the lawful orders of the court which has resulted in his being held in contempt of court. *We specifically found that the state's right to regulate schools, including the Faith Baptist Church school, was a reasonable regulation* and did not impose an unreasonable burden upon Sileven's religious beliefs, nor violate his first or ninth amendment rights. Sileven is simply wrong if he believes that he may consistently and continually flout the law by merely declaring that it is contrary to his religious beliefs, no matter how sincerely held.

(Emphasis added.) *Id.* at 886, 326 N.W.2d at 853-54. It also should be noted that *Sileven v. Tesch,* was Sileven's attempt to be released from incarceration by writ of ha-

beas corpus. Sileven was a party to the *Faith Baptist* litigation; the opinion in *Sileven v. Tesch* by necessity addressed Sileven's rights in light of those rights having once been adjudicated.

More recently, the Nebraska Supreme Court has used language unequivocally indicating that *Faith Baptist* was not intended to be limited to its facts. In *State ex rel. Douglas v. Bigelow,* 214 Neb. 464, 334 N.W.2d 444 (1983), the defendant contended that state education regulations abridged her First, Ninth, and Fourteenth Amendment rights. This court responded:

> Again, the same constitutional claims which defendant makes here were analyzed and adjudicated adversely to her position in *Faith Baptist Church, supra,* and its predecessor, *Meyerkorth v. State,* 173 Neb. 889, 115 N.W.2d 585 (1962), *appeal dismissed* 371 U.S. 705, 83 S.Ct. 1018, 10 L.Ed.2d 125 (1963). No useful purpose would be served by restating the legal analyses and rationales for the rulings pronounced therein. Suffice it to say that the opinion of this court in *Faith Baptist Church, supra,* enunciates the law of Nebraska with respect to the constitutional issues presented by this case.

The Constitution of Nebraska, Article 1, Section 3, provides "No person shall be deprived of life, liberty, or property, without due process of law." The defendants, in their brief to the Nebraska Supreme Court, did NOT discuss how this constitutional provision was violated. Their entire argument, with respect thereto, appears on page 17 of their appellate brief to the Nebraska Supreme Court where the conclusion is made that the "Nebraska school laws and regulations, as applied to appellants, violate the appellants' right to freely exercise their religion and to direct the education and upbringing

of their children as guaranteed by Article I, Sections 1, 3, 4, and 26 of the Nebraska Constitution." It is well settled law in Nebraska that errors assigned but not discussed in the brief of the appellant or the brief of the appellee will not be considered by the Nebraska Supreme Court on appeal. Neb.Rev.Stat. § 25-1919 (Reissue 1979); Neb.Sup.Ct.R. 9D(1)d (Rev. 1982); *State ex rel. Douglas v. Bigelow,* 214 Neb. 464, 469, 334 N.W.2d 444 (1983). The reason is obvious. Equally obvious is the fact that no court could determine from the above quote if any constitutional provision was violated. Finally, defendants' argument that the Nebraska statutes and administrative rules violate the Nebraska Constitution are being made to the wrong court. The complaint is untenable.

Also untenable is the defendants assertion in paragraph 15 of their answer that the "Church has refused, for reasons of religious conviction, to submit their teachers to certification." Neb.Rev.Stat. § 79-1229 (Reissue 1981), which is cited by the defendants in paragraph 15 of their answer (Appendix "B"), does NOT require any church to submit their teachers to certification. Neb.Rev. Stat. § 79-1229 (Reissue 1981) declares:

> All persons holding the official title of (1) superintendent of schools, (2) principal or supervisor of an accredited school, or (3) supervisor of any special subjects or subject in which such persons actually supervise the work of other teachers in that subject or those subjects, shall hold either a Nebraska Administrative and Supervisory Certificate or a Nebraska Professional Administrative and Supervisory Certificate.

Thus neither paragraph 15 or any other paragraph in the defendants answer properly raise any constitutional

issue that can only be resolved by trial and the defendants have cited no such paragraphs in their petition for a writ of certiorari to this Court.

Likewise untenable is the defendants citation to *Ohlman, et al. v. Douglas, et al.*, CV82-L-467 (D.Neb. filed 1982). The defendants have patched together disparate portions of the court's preliminary opinion in that case. The end result is a broken-mirror image of the case which distorts rather than reflects the posture of that case. One need only consider that Attorney General Douglas and the other defendants in that case are governmental officials whereas in the case at bar the governmental officials are the plaintiffs. Simply stated, the issues in *Ohlman* are different from the issues in the case at bar. Thus *Ohlman* is not in point.

Perhaps comment should be made with regard to the statement on page 17 of petition for a writ of certiorari in this case that the defendants "have already been forced to suffer because of the lack of opportunity to present their constitutional and religious claims." It is submitted that if these defendants have suffered it is because of their own doing and not because of the laws of the State of Nebraska. As stated in *Prettyman v. State of Nebraska*, 537 F.Supp. 712, 715 (D.Neb. 1982):

> The challenged statutes do not prevent the plaintiffs from operating a school which inculcates their children with their religious convictions, they only require that the school meet the de minimis certification and attendance standards imposed on all Nebraska schools to ensure that the State meet its educational obligations to its young people. Under the precipitated more by obstinance than by the caprice circumstances here, plaintiffs alleged injury seems of the State.

The defendants in the case at bar seek a writ of certiorari of *State ex rel. Kandt v. North Platte Baptist Church,* 216 Neb. 684, 345 N.W.2d 19 (1984). It is to be noted that case is number 83-409 and that the opinion was filed March 2, 1984. It is also to be noted (see Appendix "C") that the defendants did NOT stay the mandate of the Nebraska Supreme Court in that case. Hence, the case at bar is moot.

There is yet another reason why the case at bar is moot. The defendants acknowledge that the Nebraska Legislature approved LB 928 on April 5, 1984. Defendants also acknowledge that LB 928 amends Neb.Rev.Stat. §§ 79-201, 79-328, and 79-1701 (Reissue 1981) and the same relieves the so-called high price they will need to pay for their alleged constitutional and religious liberties. It is, of course, well-settled law that where a statute has been amended during the pendency of an action it is reviewed as it presently stands, not as it once did. *Hall v. Beals,* 396 U.S. 45, 48, 24 L.Ed 2d 214, 90 S.Ct. 200 (1969); *Golden v. Zwickler,* 394 U.S. 103, 108, 22 L.Ed.2d 113, 89 S.Ct. 956 (1969). The defendants however, have totally failed to demonstrate in their petition for a writ of certiorari how LB 928 infringes upon any of their alleged constitutional and religious liberties. Consequently, the case at bar is indeed moot.

II.

Injunctive relief is a proper remedy where there is a continuous violation of statutes which act to protect public rights.

In *State ex rel. Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571, *appeal dismissed,* 454 U.S. 803 (1981), the Nebraska Supreme Court considered the appropriateness of injunctive relief in a case with extremely similar facts and pleadings. The petition for injunction in that case alleged the continuous nature of the violations and the need for protection of public rights in the exact same language as paragraph 6 of the plaintiff's petition in the case at bar. In reviewing the appropriateness of injunctive relief, the Nebraska Supreme Court stated:

> [A] court of equity may properly afford injunctive relief when there has been a continuing and flagrant course of violations of the . . . law. . . .

Id., 207 Neb. 806, 807, 301 N.W.2d 571, 575.

In the case at bar, as well as in *State ex rel. Douglas v. Faith Baptist Church, supra,* there was an admitted continuing and flagrant course of violations of the law. Indeed, in paragraph 4 of their answer (Appendix "B"), the defendants admit the assertions in paragraph 3 of the plaintiffs' petition (Appendix "A"), that the North Platte Christian School opened in January, 1979, and has continuously operated since that time. Defendants also admit in their answer to violations of numerous Nebbraska statutes and regulations as demonstrated previously in this brief. The school laws violated herein were enacted for the protection of the public welfare. A fortiori, the continuing and flagrant course of violations of such laws by the defendants were properly enjoined by the district court and the Nebraska Supreme Court.

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CONCLUSION

In their petition, the plaintiffs alleged the Defendants violated eight separate state education laws and regulations. The defendants admitted out-right five of the violations in their answer and admitted the material facts in the other three violations that were alleged in the plaintiffs' petition. Obviously, the defendants admitting to five of the violations in their answer is more than enough to sustain the injunction in this case. For any and all the reasons discussed herein, a writ of certiorari should be denied. The defendants (petitioners) have totally failed to make out a prima facie case.

Respectfully submitted,

STATE OF NEBRASKA, Respondent

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Attorney General

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APPENDIX "A"

IN THE DISTRICT COURT IN AND FOR
LINCOLN COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel,
CHARLES L. KANDT, Lincoln
County Attorney,

Plaintiff,

vs

NORTH PLATTE BAPTIST CHURCH
of North Platte, Nebraska,
a Corporation; NORTH PLATTE
CHRISTIAN SCHOOL, North Platte, Nebraska; and
ROBERT D. GELSTHORPE;

Defendants.

PETITION

Comes now the plaintiff and for cause of action against the defendants and each of them alleges:

1. This action is brought in the name of the State of Nebraska by Charles A. Kandt, duly appointed, qualified and acting County Attorney of Lincoln County, Nebraska, who is charged by statute with enforcement of the laws of the State of Nebraska, with special reference in this proceeding to the laws pertaining to public and private schools.

2. Defendant North Platte Baptist Church of North Platte, Nebraska is a non-profit corporation, organized and existing under the laws of the State of Nebraska, with its principal place of business in North Platte, Lincoln County, Nebraska. Defendant North Platte Christian School is a private school operated by said North Platte

Baptist Church in North Platte, Lincoln County, Nebraska, providing educational services for children in grades kindergarten through twelfth. Defendant Robert D. Gelsthorpe is the minister and president of North Platte Baptist Church of North Platte, Nebraska, and superintendent and teacher of North Platte Christian School.

3. Defendant North Platte Baptist Church of North Platte, Nebraska is conducting, through its minister and Board of Directors, a private school in North Platte, Lincoln County, Nebraska known as North Platte Christian School, which school opened in January, 1979 and has been operated as a private school continuously, except for summer vacation, to this date, and will continue to be so operated unless restrained and enjoined.

4. North Platte Christian School is being operated in violation of the School laws of the State of Nebraska as follows:

a. Failing to make reports as required by Section 79-207 R.R.S. Nebraska.

b. Defendant Robert D. Gelsthorpe, superintendent does not hold a Nebraska Administrative and Supervisory Certificate or a Nebraska Professional Administrative and Supervisory Certificate as required by Section 79-1233 R.R.S. Nebraska 1943.

c. Defendant Robert D. Gelsthorpe is a teacher in said school without holding a Nebraska Teaching Certificate or permit issued by the Commissioner of Education as required by Section 79-1233 R.R.S. Nebraska 1943.

d. Failying to register teachers' or administrators' certificates in the office of the County Superintendent of the County of Lincoln

County, Nebraska, as required by Section 79-1239 R.R.S. Nebraska 1943.

e. Failing to render a Fall Approval Report to the State Department of Education of the State of Nebraska as required by Rule 14-(5) (a) (i) of the Rules and Regulations of the State Department of Education of the State of Nebraska.

f. Failing to have on file in the State Department of Education of the State or Nebraska a complete transcript of all college credits earned by any teacher in North Platte Christian School as required by Rule 14-41 of the Rules and Regulations of the State Department of Education of the State of Nebraska.

g. Failing to seek initial approval status as an approved school system as required by Rule 14-(2) of the Rules and Regulations of the State Department of Education of the State Department of Education of the State of Nebraska.

h. Failing to comply with the School Laws of the State of Nebraska in the operation of a private school.

5. Defendant Robert D. Gelsthorpe, in the capacity as minister and President of the corporation, North Platte Baptist Church of North Platte, Nebraska, is sponsoring North Platte Christian School and permitting the use of church property for the operation of said school. Demand has been made upon the defendant Robert D. Gelsthorpe superintendent of North Platte Christian School for information and requesting compliance with the school laws of Nebraska, but he has refused and neglected to furnish information or comply therewith.

6. The violations of the school laws of the State of Nebraska by the defendants are continuous and are being constantly repeated so that the remedy at law would require the bringing of successive and multiple actions, thereby rendering such remedy inadequate. Defendants have repeatedly stated that North Platte Christian School is not subject to the school laws of the State of Nebraska. The operation thereof violates the public policy of this State, and constitutes a continuing and flagrant course of violations of the school laws of the State of Nebraska. The protection of public rights and the welfare of the citizens, as well as the welfare of pupils attending said school, is sufficient to invoke the injunctive processes of this Court.

WHEREFORE plaintiff prays that the defendants and each of them be enjoined from further operation of North Platte Christian School or participation therein without complying with the school laws of the State of Nebraska, that a permanent injunction issue, and for such other and further relief as may be just and equitable.

STATE OF NEBRASKA, ex rel,
CHARLES A. KANDT, Lincoln
County Attorney, Plaintiff

/s/ CHARLES A. KANDT
Lincoln County Attorney

STATE OF NEBRASKA)
) ss.
COUNTY OF LINCOLN)

Charles A Kandt, being duly sworn upon oath, deposes and says that he has read the foregoing Petition,

knows the contents thereof, and that the facts contained therein are true.

/s/ CHARLES A. KANDT

Subscribed and sworn to before me Sept. 7, 1982.

/s/ Carol Te Poel
Notary Public

(Stamp)

APPENDIX "B"

IN THE DISTRICT COURT IN AND FOR
LINCOLN COUNTY, NEBRASKA

STATE OF NEBRASKA, ex rel,
CHARLES L. KANDT, Lincoln
County Attorney,

Plaintiff,

vs

NORTH PLATTE BAPTIST CHURCH
of North Platte, Nebraska,
a Corporation; NORTH PLATTE
CHRISTIAN SCHOOL, North Platte, Nebraska;
And ROBERT D. GELSTHORPE;

Defendants.

ANSWER TO PETITION FOR INJUNCTION

Come now the defendants and in answer to plaintiff's petition for injunction, state as follows:

1. Defendants admit the allegations contained in paragraph 1 of the Petition for Injunction;

2. Defendants admit the allegations of paragraph 2 of the Petition for Injunction but deny that defendant Robert D. Gelsthorpe is a teacher of North Platte Christian School.

3. Defendants deny that North Platte Christian School is a "private" school within the meaning the Nebraska statutes, it being instead a denominational school.

4. Defendants admit the allegations of paragraph 3 of the Petition for Injunction but deny the allegation that North Platte Christian School is a "private" school within the meaning of Nebraska statutes, it being instead a denominational school.

4a. Defendants admit the allegations of paragraph 4a of the Petition for Injunction.

4b. Defendants deny the allegations of paragraph 4b of the Petition for Injunction in that section 79-1233, R.R.S. Nebraska 1943 imposes no such requirement upon the defendants.

4c. Defendants deny the allegations of paragraph 4c of the Petition for Injunction.

4d. Defendants deny the allegations of paragraph 4d of the Petition for Injunction, in that section 79-1239, R.R.S. Nebraska 1943 imposes no such requirement on non-public schools, teachers or administrators.

4e. Defendants admit the allegations of 4e of the Petition for Injunction.

4f. Defendants admit the allegations of 4f of the Petition for Injunction.

4g. Defendants admit the allegations of 4g of the Petition for Injunction.

4h. Defendants admit in part and deny in part the allegations of paragraph 4h of the Petition for Injunction.

5. Defendants admit that Robert D. Gelsthorpe is the Minister and President of North Platte Baptist Church of North Platte, Nebraska, but deny that he "is sponsoring" North Platte Christian School and permitting the use of church property for the operation of said school. Sponsorship and ownership of the North Platte Christian School is entirely within the domain of the North Platte Baptist Church. Defendants admit that de-

mand has been made upon Robert D. Gelsthorpe for information and compliance with the school laws of Nebraska. Defendants deny the remaining allegations and demand strict proof thereof.

6. The allegations contained in paragraph 6 are conclusions of law to which no response is required.

AFFIRMATIVE DEFENSES

7. Defendant North Platte Baptist Church of North Platte, Nebraska, is an independent, fundamental Bible-believing and teaching Church, an integral part of the ministry of which is the operation of the Christian school. The Church ministry of North Platte Baptist Church includes North Platte Christian School, with Reverend Robert D. Gelsthorpe being responsible for the school as a ministry of the Church. The Church and its school are supported solely out of tuition and free will offerings of its religious supporters and receives no local, state or federal tax support.

8. North Platte Christian School:

(a) is a Christian ministry which is conducted as an integral part of the religious mission of the North Platte Baptist Church;

(b) is an institution whose dominant purpose is the inculcation of religious values;

(c) is an institution in which religion is so pervasive that it can be fairly said that the religious misson of the school is the only reason for the school's existence;

(d) is an institution whose affirmative, if not dominant, policy of instruction for school children is to assure

future adherents to the Christian faith by having control of their education at an early age;

(e) is housed in a building whose exterior contains identifying religious symbols, and whose interior, such as classrooms and hallways, contain Christian religious symbols, as well as inspirational quotations from scripture and other religious doctrinal sources;

(f) is an institution which has an atmosphere in which religious instruction and religious vocations are integral in the total educational function;

(g) employs teachers who are subject to the direction and discipline of religious authority which necessarily pervades the school;

(h) employs teachers who work in the school to inculcate the tenants of the Christian religion and who are dedicated to rearing children in that faith;

(i) employs teachers, all of whom are Bible-believing and practicing Christians;

(j) is operated in accordance with the convictions of its membership, sourced solely in its religion as required by the Bible, for the ultimate purpose of instructing the children in the philosophy and mandates of the scriptures, in such manner as to lay a biblically motivated educational foundation for the free choice of spiritual salvation and discipleship; and

(k) does not divide instruction into "religious" and "secular" components, the entire ongoing life of the Church-school community being religious.

9. Reverend Robert D. Gelsthorpe is an ordained minister of the gospel. As such, he is charged with the

duty to bear witness to the Lord and further religious mission of the Church through establishing and maintaining of a religious school.

10. Pastor Gelsthorpe has the duty to make decisions regarding the operation of North Platte Christian School of North Platte, Nebraska, in cooperation with other members of the church in order to fulfill the religious mission of the Church.

11. The ministry of the North Platte Baptist Church is centered on the biblical concepts that all men are sinners, and that the consequences of sin is eternal separation from God for eternity in literal hell and that this consequence can be avoided only in one way, by trusting in Jesus Christ, alone, for one's salvation. The members of North Platte Baptist Church further believe that salvation is a free gift by God to all who trust in Jesus Christ and that the fact of his death, burial and resurrection is a payment for all sins for those who only believe.

12. In observance of the commands of the Bible, defendants, as a matter of firm conviction and practice of the Church's membership, operate an educational ministry, which is conducted for the sole and ultimate purpose of spreading the Christian gospel's good news of the manner in which salvation is obtained, and teaching and growing in discipleship to the Lord Jesus Christ.

13. Primary teachers of North Platte Christian School are either college graduates or have college training. These teachers have embraced teaching in the moral and religious formation of the young as a Christian apostolate. All of the teachers employed in the school meet religious and other criteria set by the Church.

14. Compelled compliance with the requirements of Section 79-1233 R.R.S. Nebraska (Reissue 1976), Section 69-1239 R.R.S. Nebraska (Reissue 1976), and the regulations promulgated pursuant thereto would substantially limit and interfere with the religious mission of defendants by denying them freedom to select teachers and teaching methods according to the dictates of their religion.

15. Sections 79-1229 R.R.S. Nebraska (Reissue 1976) requires school administrators and supervisors to be certificated by the state. The Church has refused, for reasons of religious conviction, to submit their teachers to certification. Defendants believe that compliance, by personnel at schools which are not public schools or accredited schools, with requirements of the aforesaid statute is not required, but if required, would substantially limit and interfere with their duty to bear witness to the Lord and to further the religious mission of the Church. Defendants are unable, for reasons of religious conviction, to submit the North Platte Christian School to licensing (i.e. state approval). Defendants are willing to make available test results or various other information which will show that the school meets or exceeds the essential requirements imposed by Rule 14 of the rules and regulations of the State Department of Education of the State of Nebraska, and is in every way equivalent to the education provided in the public schools of Nebraska.

16. Section 79-1701 R.R.S. Nebraska (Reissue 1976) requires that:

> All private, denominational, and parochial schools in the State of Nebraska, and all teachers employed or giving instruction therein, shall be subject to and gov-

erned by the provisions of the general school laws of the state so far as the same apply to grades, qualifications, and certification of teachers and promotion of pupils. All private, denominational, and parochial schools shall have adequate equipment and supplies, and shall be graded the same and shall have courses of study for each grade conducted therein, substantially the same as those given in the public schools where the children attending would attend in the absence of such private, denominational, or parochial schools.

17. Section 79-1705 R.R.S. Nebraska (Reissue 1976) authorizes the county superintendent or public school officials to inspect private, denominational, and parochial schools for compliance with Sections 79-1701 through 79-1707 R.R.S. Nebraska (Reissue 1976). Section 79-1706 R.R.S. Nebraska (Reissue 1976) requires that pupils attending a school which is not in conformity with Sections 79-1701 through 79-1706 shall be required to attend public school. Section 79-1707 establishes penalties for violations of the provisions of Sections 79-1701 through 79-1706 R.R.S. Nebraska (Reissue 1976).

18. The imposition of the aforesaid requirements of Sections 79-1701 through 79-1707 R.R.S. Nebraska (Reissue 1976), as well as imposition by plaintiffs upon defendants of Section 79-207 R.R.S. Nebraska (Reissue 1976), Sections 79-1229 R.R.S. Nebraska (Reissue 1976), Section 79-1233 R.R.S. Nebraska (Reissue 1976), and Section 79-1239 R.R.S. Nebraska (Reissue 1976), and application of any regulations promulgated pursuant to their statutes violates the Free Exercise Clause of the First Amendment to the United States Constitution inasmuch as:

(a) Defendant, Rev. Robert D. Gelsthorpe will be deprived of his liberty to freely carry out his religious mission in the form of Christian education;

(b) The Church then will be deprived of its liberty to freely carry out its religious mission in the form of Christian education;

(c) The evangelical ministry of the Pastor, Church, and teachers associated with the North Platte Christian School as realized in their religious mission of the school in their charge will be chilled in its exercise, if not destroyed; and

(d) there exists no compelling state interest to justify their violations of defendants' religious liberty or, if such interest does exist, those requirements do not represent those means least restrictive of religious freedom available to assure such interest. In particular, there exists no body of empirical proof that state certification of teachers or administrators is necessary to good education.

19. The imposition by plaintiffs upon defendants of the aforesaid statutory requirements and rules upon defendants violates Article I, Section 4 of the Nebraska Constitution inasmuch as:

(a) said requirements burden the liberty of defendants to carry out their religious responsibilities according to the dictates of their religious beliefs;

(b) said requirements unduly burden and restrict religious education; and

(c) there exists no compelling state interest to justify these violations of the plaintiffs' religious liberty.

20. The imposition of the aforesaid statutory requirements upon the religious educational ministries of

the defendants violate rights guaranteed to defendants by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, inasmuch as defendants will be arbitrarily deprived of rights of property and enterprise, and further will be denied the benefits of a non tax-supported educational enterprise to which they have devoted money and contributed personal services to help create and maintain.

21. Section 79-328(5)(c) R.R.S. (Reissue 1976) authorizes the State Board of Education to:

> . . . establish rules and regulations based upon the program of studies, guidance services, the number and preparation of teachers in relation to the curriculum and enrollment, instructional materials and equipment, science facilities and equipment, library facilities and materials, health and safety factors in buildings and grounds, and procedures for classifying, approving, and accrediting schools, for approving the opening of new schools, for the continued legal operation of all schools, . . .

22. The power to establish rules and regulations which is granted to the State Board of Education by Section 79-328(5)(c) R.R.S. (Reissue 1976), is unreasonable, arbitrary, and vague, and is therefore violative of rights guaranteed to defendants by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

23. Rule 14, which has been promulgated by the State Board of Education pursuant to Section 79-328(5) (c) R.R.S. (Reissue 1976), establishes regulations for the approval of public and nonpublic schools. Only those schools which are approved pursuant to the criteria established by this rule may be considered to be provid-

ing a program which is in compliance with the compulsory attendance laws.

24. Rule 14 establishes extensive and exhaustive requirements relating to courses of study, program preparation, assignment of teachers, and use of instructional materials and equipment in secondary and elementary schools. Compliance with these requirements would substantially limit and interfere with rights of religious liberty and rights of property and enterprise which are guaranteed to defendants by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 4 of the Nebraska Constitution.

25. The Nebraska Legislature has no authority under the Nebraska Constitution to pass statutes and regulations applicable to defendants, or other private, denominational or parochial schools, nor is the Legislature empowered by the Nebraska Constitution to grant to the State Board of Education the authority to promulgate rules and regulations applicable to defendants, or other private, denominational or parochial schools. The aforementioned statutes and regulations as applied to defendants are ultra vires of the State of Nebraska, as Article VII, Section 1 of the Nebraska Constitution gives the Legislature power only in respect to the common schools of the state, or educational institutions owned and controlled by the state or political subdivision thereof, and Article VII, Section 2 of the Nebraska Constitution gives the Department of Education the power to supervise and administer only the public school system, or activities the Legislature may direct as limited by Article VII, Section 1 of the Nebraska Constitution.

26. The Nebraska school laws violate the defendants' right to free association and free speech as guaran-

teed by the Nebraska Constitution and by the First Amendment to the United States Constitution.

27. The Nebraska school laws as applied to these defendants violate defendants' right to direct the upbringing their children as guaranteed by the Nebraska Constitution and by the Ninth Amendment to the United States Constitution.

NORTH PLATTE BAPTIST CHURCH,
North Platte, Nebraska, et al.
Defendants.

/s/ Richard W. Moore
Charles E. Craze
Jerome C. Webbs
GIBBS & CRAZE CO., L.P.A.
6929 W. 130th-Suite #600
Cleveland, OH 44130
(216) 845-6800

George Clough
CLOUGH & HAYS
108 E. 2nd Street
North Platte, Nebraska 69101
(308) 534-5623

CERTIFICATE OF SERVICE

Your undersigned hereby certifies that a true copy of the above and foregoing Answer to Petition for Injunction was served upon counsel for the adverse party by personally handing same to counsel of record for said adverse party, to-wit:

Charles A. Kandt
Lincoln County Attorney
Lincoln County Courthouse
North Platte, Nebraska

on this 8th day of October, 1982.

George E. Clough

APPENDIX "C"

Nebraska Supreme Court
Form No. D-001 New 1/80
Mandate: GENERAL

Date: March 23, 1984

IN THE SUPREME COURT OF THE
STATE OF NEBRASKA

To: District Court of Lincoln County, Nebraska
WHEREAS, in late action in your court, captioned:

State ex rel., Charles A. Kandt, Lincoln
County Attorney, Plaintiff

vs.

North Platte Baptist Church of North
Platte, Nebraska et al., Defendants

you rendered judgment

And, WHEREAS, defendants

prosecuted an appeal to this court.

ON CONSIDERATION WHEREOF,

the judgment which you rendered has been affirmed by the Supreme Court.

Costs of this appeal are to be paid by appellants and are taxed at $50.00.

NOW, THEREFORE, you shall, without delay, proceed to enter judgment in conformity with the judgment and opinion of this court.

WITNESS the Honorable Norman Krivosha, Chief Justice, and the seal of this court.

(SEAL)

Kenneth A. Wade
Acting Deputy Clerk of the Supreme Court
/s/ Jan Culver
Deputy Clerk

Supreme Court No.
83-409

Trial Tribunal No.
84-85

Date Opinion Issued
3/2/84

COSTS IN SUPREME COURT

Costs due Clerk Supreme Court	$	-0-
Brief Fee due Appellant	$	
Brief Fee due Appellee	$	
Docket Fee due	$	
Due	$	
Due	$	
Paid by Clerk of the District Court	$	50.00
TOTAL COSTS	$	50.00

Costs should be distributed in accordance with
§ 25-1915 R.R.S. 1943

NEBRASKA SUPREME COURT
Form No. F-003
Rev. April 1983

SUPREME COURT)
) ss.
STATE OF NEBRASKA)

I certify that I have compared the foregoing copy of the mandate issued March 23, 1984, in the following case: No. 83-409, State ex rel., Charles A. Kandt vs. North Platte Baptist Church of North Platte, Nebraska with the original now on file in my office. The same is a correct copy of the original.

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln, on September 19, 1984
(date)

Kenneth A. Wade
Acting Deputy Clerk
/s/ Kenneth A. Wade
Deputy Clerk